APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-2522

JOSEPH S. COCHRAN; BRENDA S. COCHRAN,
Appellants,

v.

ANN VENEMAN, Secretary, U.S. Department of Agriculture; NATIONAL DAIRY PROMOTION BOARD Appellees And FRED LOVELL; LEE GREENWALT; JACKIE ROOT; EARNEST NORMAN; STEPHEN MASHALL; CECIL MOYER; JAMES VANBLARCOM,
Intervenors-Appellees.

January 12, 2004, Argued
February 24, 2004, Filed

JUDGES: Before: Sloviter, Rendell and Aldisert, *Circuit Judges.*

The American public is very familiar with the "Got Milk?™ " ads on television and in the print media.

This appeal requires us to decide whether a federal statute may compel a small dairy farm in Pennsylvania to help pay for the white-mustache milk advertisements and other dairy promotions. Implicated here are general First Amendment precepts that protect the right to refrain from speaking and the right to refrain from association, and the specific issue of whether the government may compel individuals to fund speech with which they disagree.

Joseph and Brenda Cochran are independent small-scale dairy farmers. They are not members of any dairy manufacturing or marketing cooperative. They alone determine how much milk to produce, how to sell and market it and to whom it will be sold.

The Dairy Promotion Stabilization Act of 1983, 7 U.S.C. § 4501 *et seq.* ("Dairy Promotion Act," "Dairy Act," or "Act"), provides for the creation of the Dairy Promotion Program and authorizes the Secretary of the Department of Agriculture ("Secretary") to issue an order creating the National Dairy Promotion and Research Board ("Dairy Board") to administer the program. To finance the promotional projects and the Dairy Board's administration of them, the Dairy Act and implementing order require every milk producer in the United States to pay mandatory assessments of 15 cents per hundredweight of milk sold.[1] *Id.* § 4504(g); 7 C.F.R. § 1150.152. Neither the Dairy Act nor the order permits dissenting milk producers to withhold contributions for advertising or promotional projects to which they object.

The Cochrans object to paying these assessments and filed an action in the United States District Court for the Middle District of Pennsylvania seeking a declaration that the Dairy

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[1] The Dairy Act provides:

> The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall . . . collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board.
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> . . .
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> The rate of assessment for milk . . . prescribed by the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof, as determined by the Secretary.

7 U.S.C. § 4504(g).

Actviolates their First Amendment rights of free speech and association.

The Cochrans operate a small commercial dairyfarm with approximately 150 cows on about 200 acres of land in Tioga County, north-central Pennsylvania. In contrast to many larger-scale commercial dairy farms, the Cochrans employ what is known as "traditional" methods of dairy farming. Traditional dairy farming is less aggressive than larger-scale commercial farming, as it allows cows more room to move and graze and does not use the recombinant Bovine Growth Hormone (rBGH).[2] The Cochrans believe that their methods result in healthier cows, a cleaner environment and superior milk. The Cochrans object to the advertising under the Dairy Act because it conveys a message that milk is a generic product that bears no distinction based on where and how it is produced, and thereby forces them to subsidize speech with which they disagree.

As the First Amendment may prevent the government from prohibiting speech, it may also prevent the government from compelling individuals to express certain views, *Wooley v. Maynard*, 430 U.S. 705, 714, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943), or pay subsidies for speech to which individuals object, *Keller v. State Bar of California*, 496 U.S. 1, 9-10, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990); *Abood v. Detroit Dep't of Educ.*, 431 U.S. 209, 234, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977).

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[2] rBGH, also known as recombinant bovine somatotropin (rBST), is a genetically engineered growth hormone administered to dairy cows to boost milk production. Although the Food and Drug Administration has approved the use of rBGH for dairy production in the United States, consumer advocates and small dairy producers have questioned the longterm effects of the growth hormone on humans, cows and the environment. *See Barnes v. Shalala*, 865 F. Supp. 550, 554 (W.D. Wis. 1994).

The Cochrans' lawsuit named as defendants Ann Veneman in her official capacity as Secretary of the United States Department of Agriculture ("USDA") and the National Dairy Promotion Board, and sought declaratory and injunctive relief from the remittance of compelled assessments by all dairy producers to finance generic dairy advertisements. Alleging that the Dairy Act unconstitutionally compels them to subsidize speech with which they disagree, the Cochrans filed a motion for summary judgment contending that their case was controlled by the teachings of *United States v. United Foods*, Inc., 533 U.S. 405, 150 L. Ed. 2d 438, 121 S. Ct. 2334 (2001), in which the Supreme Court held that compelled subsidies under the Mushroom Promotion, Research, and Consumer Information Act of 1990 ("Mushroom Act"), 7 U.S.C. § 6101 *et seq.*, violated First Amendment protections.

The Government filed a motion to dismiss or, in the alternative, for summary judgment, arguing that this case is controlled by the teachings of *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (1997), in which the Supreme Court upheld compelled subsidies for advertising California tree fruit under two marketing orders issued pursuant to the Agricultural Marketing and Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 608c *et seq*. The Government argued that the generic dairy advertising subsidized under the Dairy Act constitutes "government speech" and is therefore immune from First Amendment scrutiny and, moreover, that the Dairy Act is a species of economic regulation that does not violate the First Amendment.[3] The district court agreed with the Government and

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[3] Seven Pennsylvania dairy farmers who support the Dairy Promotion Act and Program petitioned the district court for leave to intervene as defendants and the district court granted the petition for intervention under Rule 24(a) of the Federal Rules of Civil Procedure. The Intervenors filed a cross motion for summary judgment, echoing the arguments made by the Government in its motion.

granted summary judgment in its favor, holding that the Dairy Act survives the deferential First Amendment scrutiny afforded to economic regulation. The Cochrans appeal.

We must decide whether the challenged communications pursuant to the Dairy Act are government speech and thereby immune from First Amendment scrutiny. If these communications are private speech, we must decide whether the Dairy Act violates the First Amendment free speech and association rights of dairy farmers. In doing so, we must consider the quantum of scrutiny to be applied to determine the validity of regulations, such as the Dairy Act, that compel commercial speech.

For the reasons that follow we reverse the judgment of the district court and hold that the compelled speech pursuant to the Dairy Act is private speech, not government speech, and is therefore subject to First Amendment scrutiny. We hold also that the Act violates the Cochrans' First Amendment free speech and association rights by compelling them to subsidize speech with which they disagree. In so doing we conclude that the subsequent Supreme Court decisions of *Glickman* in 1997 and United Foods in 2001 severely dilute the precedential vitality of our ultimate holding in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), in which we concluded that the compelled assessments pursuant to the Beef Promotion Research Act of 1985, 7 U.S.C. § 2901 *et seq.*, survived First Amendment scrutiny.

I.

In determining the side on which the axe must fall—on Glickman or on United Foods—we must start by examining why the Supreme Court went one way in its first case of Glickman and the other way in its subsequent decision in United Foods.

A.

In Glickman, producers of California tree fruits (including nectarines, plums and peaches) challenged the constitutionality of regulations contained in marketing orders promulgated by the Secretary pursuant to the AMAA, 7 U.S.C. § 608c *et seq.*, that imposed mandatory assessments on fruit tree growers to cover the expenses associated with the marketing orders, including the costs of generic advertising. 521 U.S. at 460. The Court emphasized that besides the advertising decisions, the economic autonomy of the fruit tree growers was otherwise restricted by a broader collective arrangement set forth in the marketing orders:

> California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Id. at 469.

In addition to advertising, the marketing orders for California fruit tree growers provided for mechanisms for establishing uniform prices, limiting the quality and quantity of tree fruit that could be marketed, determining the grade and size of the fruit and orderly disposing of any surplus. *Id.* at 461. The orders also authorized joint research and develop ment projects, quality inspection procedures and standardized packaging requirements—all of which were financed by the compelled assessments. *Id.*

The Court determined that the collective arrangement of the fruit tree farmers was similar to the union arrangement at issue in *Abood v. Detroit Board of Education*, 431 U.S. 209,

52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977), and the bar association at issue in *Keller v. State Bar of California*, 496 U.S. 1, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990). In *Abood*, the Court held that the infringement upon First Amendment associational rights by compelled assessments for a union shop arrangement was "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222. Similarly, in *Keller*, the Court held that the infringement upon First Amendment associational rights by compelled assessments for a state bar program was constitutionally justified by the State's interest in regulating the legal profession and improving the quality of legal services. 496 U.S. at 13. Finding parallels between the facts of *Abood* and *Keller*, in *Glickman* the Court concluded that as part of the AMAA marketing orders, the compelled assessments for generic advertising of California tree fruit were ancillary to a comprehensive marketing program, and therefore were "a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress." 521 U.S. at 477.

"The opinion and the analysis of the Court [in *Glickman*] proceeded upon the premise that the producers were bound together and required by the statute to market their products according to cooperative rules. To that extent, their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation." *United Foods*, 533 U.S. at 412.

B.

Four terms later, in United Foods the Court held that mandatory assessments imposed on mushroom producers for the purpose of funding generic mushroom advertising under the Mushroom Act, 7 U.S.C. § 6101 *et seq.*, violated the First Amendment. 533 U.S. at 416. The Court distinguished the statutory context at issue in United Foods from that in

Glickman, explaining that under the stand-alone Mushroom Act "the compelled contributions for advertising are not part of some broader regulatory scheme" and the advertising was itself the "principal object" of the Mushroom Act. *Id.* at 415. As such, "the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." *Id.* at 413 (citing *Abood*, 431 U.S. at 209; *Keller*, 496 U.S. at 1). The Court concluded that the compelled assessments pursuant to the Mushroom Act were unlike the situation in *Abood*, *Keller* and *Glickman*, in which:

> Those who were required to pay a subsidy for the speech of the association already were required to associate for other purposes, making the compelled contribution of moneys to pay for expressive activities a necessary incident of a larger expenditure for an otherwise proper goal requiring the cooperative activity.

Id. at 414.

Fundamentally, the Court noted that "[w]e have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself." *Id.* at 415. Concluding that the only program the compelled contributions for advertising pursuant to the Mushroom Act serve "is the very advertising scheme in question," the Court ruled that the compelled assessments were not permitted under the First Amendment. *Id.* at 416.

C.

Guided by the express reasoning of the Court in *Glickman* and *United Foods*, we must first look at the broader statutory scheme presented in the Dairy Act, or more specifically, we must ascertain whether the dairy producers are "bound together and required by the statute to market their products according to cooperative rules" for purposes other than

advertising, or speech. *United Foods*, 533 U.S. at 412. It is to a description of the Dairy Act we now turn.

II.

The Dairy Promotion Program set forth in the Dairy Act is one in a long series of federal "checkoff" programs for promoting agricultural commodities.[4] Enacted in 1983, the Dairy Act authorizes the Secretary of Agriculture to establish a program for the "advertisement and promotion of the sale and consumption of dairy products [and] for research projects related thereto." 7 U.S.C. § 4504(a). The declared purpose of the Dairy Act is to provide for "an orderly procedure for financing . . . and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace . . . ." *Id.* § 4501(b).

The Dairy Act is a stand-alone law that was not passed as part of any other federal dairy regulatory scheme. It directs the Secretary to appoint a Dairy Board composed of private milk producers to administer the Dairy Promotion Program. Id. §§ 4504 (b) & (c). The Act provides that every milk producer must pay a mandatory assessment of 15 cents per hundredweight of milk sold to finance the promotional programs and the Dairy Board's administration of them.

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[4] Other stand-alone checkoff programs established by Congress which have been subject to First Amendment challenges include: Beef Research and Information Act of 1976 ("Beef Act"), 7 U.S.C. § 2901 *et seq.* (invalidated by *Livestock Marketing Ass'n v. U.S. Dep't of Agric.*, 335 F.3d 711 (8th Cir. 2003) (reh'g den. Oct. 16, 2003)); Pork Promotion, Research, and Consumer Information Act of 1985 ("Pork Act"), 7 U.S.C. § 4801 *et seq.* (invalidated by *Michigan Port Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157 (6th Cir. 2003)); Mushroom Act, 7 U.S.C. § 6101 *et seq.* (invalidated in 2001 by *United Foods*, 533 U.S. at 405). Cf. *Glickman*, 521 U.S. at 457 (upholding as constitutional marketing orders for California tree fruits promulgated pursuant to the AMAA, 7 U.S.C. § 608c *et seq.*, which included compelled assessments to fund, among other things, generic advertising).

Pursuant to the authority provided in 7 U.S.C. § 4503(a), the Secretary issued an order in March 1984 establishing the Dairy Board, 7 C.F.R § 1150.131, and the Board proceeded to collect the mandatory assessments from all milk producers, 7 C.F.R § 1150.152. For the Cochrans, the compelled assessments amount to roughly $ 3,500 to $ 4,000 per year.

The Dairy Board is composed of commercial milk producers who are nominated by "eligible associations," which are private associations of milk producers that engage in dairy promotion at the state and regional level. *Id.* §§ 1150.133, 1150.273. The primary consideration in determining an organization's eligibility is "whether its membership consists primarily of milk producers who produce a substantial volume of milk" and whose overriding interests lay in the production and promotion of fluid milk and other dairy products. *Id.* § 1150.274(b).

In 1994, the Dairy Board created Dairy Management, Inc. ("DMI"), a District of Columbia corporation that now oversees and administers the promotional activities of the Dairy Act. DMI is a joint undertaking of the Dairy Board and the United Dairy Industry Association ("UDIA"), which is an association of state and regional dairy promotional programs that are considered "Qualified Programs" under the Dairy Act. "Qualified Programs" are local promotional programs, many of which preexisted the Dairy Act, to which milk producers may contribute a portion of the money they would otherwise pay in assessments under the Act. *See* 7 U.S.C. § 4504(g)(4), 7 C.F.R. §§ 1150.152(c), 1150.153. The Act thus requires dairy farmers to pay either the full 15 cent per hundredweight assessment to the Dairy Program or part to the Dairy Program and part to a Qualified Program that engages in state or regional generic advertising. The Dairy Board and the DMI Board are composed entirely of private milk producers and other private parties, and the Dairy Promotion Program is funded entirely by private milk producers through

the compelled assessments. The Dairy Promotion Program website explains: "Checkoff programs are funded by dairy producers—NOT TAXPAYERS. They are not governmental programs; rather, they are businesses with governmental oversight."[5]

The Secretary's oversight responsibilities pursuant to the Dairy Act are conducted by the Agricultural Marketing Service ("AMS"), a division of the USDA, and are limited to ensuring that the Dairy Promotion Program is in compliance with the Act. *See, e.g.*, 7 U.S.C. § 4507(a) (authorizing the Secretary to terminate an order issued under the Act only when she determines that it "obstructs or does not tend to effectuate the declared policy of" the Act). AMS guidelines explain that "[i]t is the policy of AMS in carrying out the oversight responsibility to ensure that legislative, regulatory, and Department policy requirements are met. It is not the intent to impose constraints on board operations beyond these requirements." AMS, Guidelines for AMS Oversight of Commodity Research and Promotion Programs 1 (1994). The Secretary's oversight functions for the Dairy Program are funded by the compelled assessments. 7 U.S.C. § 4504(g)(2); 7 C.F.R. § 1150.151(b). Moreover, the dairy producers, not the government, control whether the Dairy Promotion Program continues via a referendum process. 7 U.S.C. § 4506(a).

All advertising and promotional programs that are financed by the compelled assessments under the Dairy Act and created by the Dairy Board and DMI promote milk as a generic product. 7 C.F.R. § 1150.114. Among advertising campaigns financed by the Dairy Promotion Program are "Got milk? tm "and "Ahh, the power of cheese."

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[5] Dairy checkoff Works!—How the Dairy Checkoff works, available at http://www.dairycheckoff.com/howitworks. htm (last visited June 3, 2002 (J.A. at 231)).

III.

In addition to the Dairy Act, the dairy industry is subject to a patchwork of federal and state regulatory laws. The district court noted four federal laws in particular that it deemed relevant to this case: (1) the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 608c *et seq.*; (2) the Agriculture Act of 1949, 7 U.S.C. § 1446; (3) import control regulations under 19 U.S.C. § 1202; and (4) the Capper-Volstead Act, 7 U.S.C. § 291.

An examination of the provisions of these statutes is crucial to determine whether these legislative acts, in conjunction with the Dairy Act, bring the case at bar within the rubric of Glickman—i.e., requiring that milk producers are bound together and obligated by statute to market their products according to some set of cooperative rules. The district court held that such a cooperative arrangement exists for dairy producers, but we conclude otherwise.

A.

The AMAA, 7 U.S.C § 608c, permits the Secretary to issue marketing orders that regulate the handling and sales of various agricultural commodities, including milk, in different regions of the country. For milk, the marketing orders establish a classification system and set minimum prices that handlers must pay in the regions in which the orders apply. *See* 7 U.S.C. § 608c(5); 7 C.F.R. § 1000.1 *et seq*. The AMAA applies only to "handlers"[6] of the covered commodities. 7 U.S.C. §§ 608c(1) & (5)(A). "Producers," such as dairy farmers in general, and Joseph and Brenda Cochran in particular, are specifically exempted from the application of marketing orders. *Id.* § 608c(13)(B) (stating that no marketing

[6] A handler is a person who purchases milk from a producer in an unprocessed form for the purpose of processing it.

order "shall be applicable to any producer in his capacity as a producer").

Although milk marketing orders restrict the decisions of dairy handlers, they do not interfere with the decisions of dairy producers, such as the Cochrans, with regard to how much milk to produce, sell or whether they must sell milk at all to dairy handlers. *See id.* § 608c(5).[7] At least 25 percent of the milk sold in the United States is sold outside of federal milk marketing orders. The Cochrans are able to and do sell much of their milk outside any milk marketing order.

B.

The Agricultural Act of 1949, 7 U.S.C. § 1446, establishes a price support program wherein manufacturers and processors of cheese, nonfat dry milk and butter can sell those products to the federal government as buyer of last resort. Producers of fluid milk, such as the Cochrans, however, are not covered by the Agricultural Act and are not permitted to sell their product to the government under the price support program.

C.

Similarly, the import control regulations under Chapter 4 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202, subject a multitude of commodities and prod-

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[7] Milk marketing orders under the AMAA are implemented on a regional basis. *See* 7 U.S.C. § 608c(11). Not all parts of the country are covered, and some states—including California, Virginia, Maine and Montana—are outside the territory of any milk marketing order. Portions of Pennsylvania fall within two different milk marketing regions, the Northeast Area and the Mideast Area. *See* 7 C.F.R. §§ 1001.1, 1033.1. Certain portions of the state, however, including where the Cochrans are located, fall outside of any federal milk marketing order. The effect of the AMAA provisions is that any particular producer's milk is subject to a marketing order only if the producer chooses to sell to a regulated handler in an area covered by a marketing order. *See id.* §§ 1001.13, 1033.13.

ucts to annual import quotas. Although certain dairy products are included - namely butter, dry milk and cheese—fluid milk is not. *See* 7 C.F.R. Pt. 6, Apps. 1, 2, 3.

D.

Finally, the Capper-Volstead Act, 7 U.S.C. § 291, permits producers of agricultural products—including milk, mushrooms and others - to enter into manufacturing and marketing cooperatives without fear of violating antitrust laws. It does not, however, require producers to enter into such cooperatives, as federal law expressly protects producers' freedom not to join any cooperative. *See Agricultural Fair Practices Act of 1967*, 7 U.S.C. § 2301 *et seq.*; *Michigan Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 477-478, 81 L. Ed. 2d 399, 104 S. Ct. 2518 (1984). The Cochrans do not belong to any cooperatives protected by the antitrust exemption created by the Capper-Volstead Act.

E.

Considering the foregoing provisions of the Dairy Act and other statutes governing the dairy industry, we now turn to the First Amendment issues that constitute the heart of this appeal.[8]

IV.

We must first consider whether the compelled assessments generated under the Dairy Act constitute private or government speech. Although the district court did not address this

[8] The United States District Court for the Middle District of Pennsylvania had jurisdiction pursuant to 28 U.S.C. § 1331 based on the Cochrans' First Amendment claim. We have jurisdiction in this timely appeal pursuant to 28 U.S.C. §§ 1291. We review de novo the constitutionality of an Act of Congress. *Dyszel v. Marks*, 6 F.3d 116, 123 (3d Cir. 1993). Similarly, our review of the district court's granting of judgment on the pleadings and summary judgment is plenary. *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 169 (3d Cir. 1999).

issue, the Government contended before the district court that the expressions generated under the Dairy Act constitute government speech. Therefore, the issue is subject to our review.

The First Amendment prohibits the government from regulating private speech based on its content, but the Court has "permitted the government to regulate the content of what is or is not expressed when [the government] is the speaker or when [the government] enlists private entities to convey its own message." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995).

The Court has not decided whether speech generated under commodity promotion laws such as the Dairy Act constitutes government speech and is thereby immune from First Amendment scrutiny.[9] But in Frame, this court did meet the issue. 885 F.2d at 1132-1133.

In line with our sister Courts of Appeals in *Michigan Port Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157, 161-162 (6th Cir. 2003) and *Livestock Marketing Ass'n v. U.S. Dep't of Agric.*, 335 F.3d 711, 720 (8th Cir. 2003), we held that the Beef Promotion Program was not government speech because it required only beef producers to fund it and it attributed the advertising under the program to the beef producers. *Frame*, 885 F.2d at 1132-1133. Recognizing that the Beef Promotion Program directed the Secretary to appoint all Cattlemen Board members and approve all budgets, plans, contracts and projects entered into by the Board, this court nevertheless

[9] The two decisions of the Court involving commodity promotion programs do not address the issue of government speech. In *Glickman*, the Secretary of Agriculture waived the issue by not pursuing it before the Supreme Court. 521 U.S. at 482 n.2 (Souter, J., dissenting). In United Foods, the Court refused to address the issue because the government failed to raise it before the Court of Appeals. 533 U.S. at 416-417.

concluded that "[t]he Secretary's extensive supervision . . . does not transform this self-help program for the beef industry into 'government speech.'" We explained:

> The Cattlemen's Board seems to be an entity "representative of one segment of the population, with certain common interests." Members of the Cattlemen's Board and the Operating Committee, though appointed by the Secretary, are not government officials, but rather, individuals from the private sector. The pool of nominees from which the Secretary selects Board members, moreover, are determined by private beef industry organizations from the various states. Furthermore, the State organizations eligible to participate in Board nominations are those that "have a history of stability and permanency," and whose "primary or overriding purpose is to promote the economic welfare of cattle producers."

Id. at 1133 (quoting 7 U.S.C. § 2905(b)(3) & (4)). The government's role in the Dairy Promotion Program is in all material respects the same as it was in the Beef Promotion Program, and under the precedent established in Frame, the Secretary's supervisory responsibilities are not sufficient to transform the dairy industry's self-help program into "government speech." On the dairy checkoff website, the government itself describes the Dairy Promotion Program as a non-governmental program, financed and directed by dairy farmers.

Although this court's First Amendment discussion and ultimate holding in Frame have been abrogated by Glickman and United Foods, none of the Court's subsequent decisions regarding "government speech" undermine our analysis of that issue in Frame.[10] Accordingly, we conclude that this is a

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[10] Notwithstanding the Government's assertions to the contrary, we are not convinced that any decisions rendered by the Court in the years following our decision in Frame require us to cast aside the government

private speech case, and thus is not immune from First Amendment scrutiny.

V.

The teachings of United Foods require us to decide whether the dairy producers are "bound together and required by the statute to market their products according to cooperative rules[,]" 533 U.S. at 412, for purposes other than advertising, or speech. That is our next task.

The Cochrans contend that the Dairy Act violates their First Amendment free speech and association rights by compelling them to subsidize generic advertising that promotes milk produced by methods they view as wasteful and harmful to the environment.

The First Amendment protects the right to refrain from speaking and the right to refrain from association. *See, e.g.*, *Wooley*, 430 U.S. at 714. Moreover, the government may not compel individuals to fund speech or expressive associations with which they disagree. *See United Foods*, 533 U.S. at 411. "First Amendment values are at serious risk if the govern-

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speech analysis we performed in Frame. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 149 L. Ed. 2d 63, 121 S. Ct. 1043 (2001) (concluding that restrictions placed on the private speech of a lawyer receiving government funding from the Legal Services Corporation were unconstitutional); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 146 L. Ed. 2d 193, 120 S. Ct. 1346 (2000) (stating in dicta, in a case where the government affirmatively disavowed any connection to the speech involved, that a government speech analysis might apply if a state university used general tuition money to fund speech attributed to the school or its administrators); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 130 L. Ed. 2d 902, 115 S. Ct. 961 (1995) (holding that Amtrak is a government actor for First Amendment purposes because it was created by statute to further government objectives and the government maintained substantial control over its daily operations); *Rust v. Sullivan*, 500 U.S. 173, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991) (concluding that the government can prevent private doctors at family planning clinics that receive federal funding from providing abortion counseling).

ment can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . . . As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny." *Id.* The individual's disagreement can be minor, as "[t]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 767, 123 L. Ed. 2d 543, 113 S. Ct. 1792 (1993)). When, however, regulation compelling funding for speech is ancillary to a broader collective enterprise that otherwise restricts the individual's market autonomy, it is considered "economic regulation," which enjoys a "strong presumption of validity" when facing a First Amendment challenge. *See Glickman*, 521 U.S. at 477.

We conclude that in upholding as constitutional the compelled subsidies under the Dairy Act, the district court misapplied *Glickman* and misconstrued the effect of the "entire regulatory scheme applicable to milk producers . . . ." (District Court Op. at 15 n. 5.) The Court in United Foods made clear that *Glickman* applied only in circumstances similar to *Abood* and *Keller*—in which individuals are "bound together" in a collective enterprise, such as a union or an integrated state bar, and the compelled subsidies are the "logical concomitant of a valid scheme of economic regulation." 533 U.S. at 412.

The provisions of the Dairy Act do not require milk producers to participate in a collective enterprise and do not compel them to market their product, fluid milk, according to any rules of a cooperative. Although the dairy industry is "regulated" in the sense that it is subject to a patchwork of state and federal laws, there is no association that all milk producers must join that would make the entire industry analogous to a union, an integrated bar or the collective enterprise at issue in *Glickman*.

The Dairy Act is a free-standing promotional program that applies to all dairy producers regardless of whether they are subject to marketing orders or any other dairy regulations. It is not ancillary to any collective enterprise or compelled association with a non-speech purpose because there is no such enterprise or association for milk that encompasses all dairy producers. Indeed, the AMAA provision for milk marketing orders, which preexisted the Dairy Act, authorizes the Secretary and marketing administrators to create dairy promotional programs that literally would be ancillary to the regulatory aspects of the milk marketing orders. *See* 7 U.S.C. 608c(5)(I). Congress chose not to utilize this precise provision of the AMAA, however, and instead adopted an entirely separate program which does not operate in concert with any collective aspect of any milk marketing order.

Moreover, as independent small-scale dairy producers, the Cochrans are exempted from the regional marketing orders under the AMAA and have chosen not to enter into manufacturing and marketing cooperatives. They, and they alone, determine how much milk to produce, how to sell and market it and to whom it will be sold. Nevertheless under the Dairy Act they are compelled to pay assessments to subsidize generic dairy advertising, a form of speech with which they are in total disagreement. Cf. *Glickman*, 521 U.S. at 471 (noting that "none of the generic advertising conveys any message with which respondents disagree").

Furthermore, as the Court in United Foods determined that speech is the principal purpose of the Mushroom Act, so it is of the Dairy Act.[11] Indeed, "almost all of the funds collected

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[11] Congress' declared policy of the Mushroom Act was

> that it is in the public interest to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and

under the mandatory assessments are for one purpose: generic advertising." *United Foods*, 533 U.S. at 412. In *United Foods*, the Court made clear that compelled subsidies may not be upheld where they are only germane to a program whose "principal object is speech itself." *Id.* at 415.

We conclude, therefore, that being compelled to fund advertising pursuant to the Dairy Act raises a First Amendment free speech and associational rights issue. But our determination that the Act's compelled assessments for generic advertising implicate the Cochrans' First Amendment rights does not end our inquiry. As this court held in Frame, "[t]he rights of free speech and association are not absolute. Thus, we must next identify the proper standard for evaluating whether the statute . . . nevertheless passes constitutional muster." 885 F.2d at 1133.[12]

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coordinated program of promotion, research, and consumer and industry information designed to—(1) strengthen the mushroom industry's position in the marketplace; (2) maintain and expand existing markets and uses for mushrooms; and (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(b). Congress' declared purpose for the Dairy Act is

that it is in the public interest to authorize the establishment . . . of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products.

7 U.S.C. § 4501(b).

[12] Upon concluding that milk producers are regulated to a similar degree as the California tree fruit growers in Glick-man, the district court applied a three-part test set forth by the Supreme Court in *Glickman*: (1) whether the Act imposes a restraint on the freedom to communicate; (b) whether the Act compels any person to engage in any actual or symbolic speech; (c) whether the Act compels dairy producers to endorse

VI.

This case is properly characterized as a compelled commercial speech case. *See United Foods*, 533 U.S. at 410; Frame, 885 F.2d at 1146 (Sloviter, J., dissenting). The Supreme Court, however, has left unresolved the standard for determining the validity of laws compelling commercial speech, and the circuit courts are divided on the issue. There are at least four variations in the judiciary's cumulative experience. One is the more lenient standard applied to commercial speech cases. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980). Another is the "germaneness" test of compelled speech cases. *See, e.g., Abood*, 431 U.S. at 235-236. Still another is an adaptation of the commercial speech standard. *See Livestock Marketing*, 335 F.3d at 722-723. And, in *Frame*, a pre-*Glickman* and pre-*United Foods* case, this court applied the stringent level of scrutiny for associational rights cases. 885 F.2d at 1134. We now summarize the various standards.

A.

In Central Hudson, the Supreme Court held that to evaluate the constitutionality of regulatory restrictions on commercial speech the Constitution requires only intermediate scrutiny—namely, that (1) the state must "assert a substantial government interest"; (2) "the regulatory technique must be in proportion to that interest"; and (3) the incursion on commercial speech "must be designed carefully to achieve the State's goal." 447 U.S. at 564. Commercial speech is "expression

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or finance any political or ideological views. (District Court Op. at 16-18.) This test, however, is inappropriate because, like the Supreme Court in *United Foods*, we have concluded that the Dairy Act is not a species of economic regulation, as it is not ancillary to a more comprehensive program restricting the marketing autonomy of dairy farmers. In *United Foods* the Court did not apply this three-part test. Nor do we.

related solely to the economic interests of the speaker and its audience." *Id.* at 561.

But the Court has left open the question of whether Central Hudson's more relaxed First Amendment test applies to cases involving compelled commercial speech. In *United Foods* the Court stepped back from addressing the issue in ipsis verbis, explaining: "the Government itself does not rely upon Central Hudson to challenge the Court of Appeals' decision, . . . and we therefore do not consider whether the Government's interest could be considered substantial for purposes of the Central Hudson test." 533 U.S. at 410. Nevertheless, in the earlier case of *Glickman*, the Court questioned the application of the commercial speech test to compelled speech cases:

> The Court of Appeals fails to explain why the Central Hudson test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech. Given the fact that the Court of Appeals relied on *Abood* for the proposition that the program implicates the First Amendment, it is difficult to understand why the Court of Appeals did not apply Abood's "germaneness" test.

521 U.S. at 474 n. 18.

Indeed, in United Foods, notwithstanding its specific disclaimer regarding Central Hudson, the Court seemingly applied the "germaneness" test:

> The only program the Government contends the compelled contributions serve is the very advertising scheme in question. Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance. The cooperative marketing structure relied upon by a majority of the Court in *Glickman* to sustain an ancillary assessment finds no corollary here; the expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself; and the rationale of *Abood* extends to the party who objects

> to the compelled support for this speech. For these and other reasons we have set forth, the assessments are not permitted under the First Amendment.

533 U.S. at 415-416 (emphasis added).

As we previously explained, the purpose of the Dairy Act is in all material respects the same as that of the Mushroom Act at issue in *United Foods*, and the Dairy Act is not ancillary to a broader cooperative marketing regime like the fruit tree marketing orders at issue in *Glickman*. The compelled assessments for generic dairy advertising under the Dairy Act are germane to nothing but the speech itself. "[A]lmost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *Id.* at 412. It would thus seem that the Dairy Act would not survive Abood's germaneness test.

Other courts have applied the germaneness test to cases involving compelled assessments pursuant to promotional programs and have rejected the application of Central Hudson. *See, e.g., Michigan Port*, 348 F.3d at 163 (noting that "[e]ven assuming that the advertising funded by the [Pork] Act is indeed commercial speech, the more lenient standard of review applied to limits on commercial speech has never been applied to speech—commercial or otherwise—that is compelled"); In re Washington State Apple Adver. Comm'n, 257 F. Supp. 2d 1274, 1287 (E.D. Wash. 2003) (concluding that "[b]ecause the Commission's assessments do not restrict speech, it is inappropriate to apply the Central Hudson test for restrictions on commercial speech").

In *Livestock Marketing*, however, the Eighth Circuit concluded that an adaptation of the Central Hudson test applied, explaining that "Central Hudson and the case at bar both involve government interference with private speech in a commercial context." 335 F.3d at 722. All the same, the court concluded that the Beef Act did not survive the intermediate scrutiny of Central Hudson. *Id.* at 725-726. Relying on the

reasoning set forth in *United Foods*, the court determined that the beef checkoff program is in all material respects identical to the mushroom checkoff program, and concluded that "the government's interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic beef advertising is not sufficiently substantial to justify the infringement on appellees' First Amendment free speech right." *Id.*

Finally, in *Frame*, which was decided before the teachings of both *Glickman* and *United Foods*, this court applied the stringent associational rights standard but nevertheless upheld the constitutionality of the Beef Act, 7 U.S.C. § 2901 *et seq.* Back in 1989, this court concluded that the government's interest in "maintaining and expanding beef markets proves . . . compelling[,]" and "[m]aintenance of the beef industry ensures preservation of the American cattlemen's traditional way of life." *Frame*, 885 F.2d at 1134-1135 (citations omitted).

Judge Sloviter, however, dissented on this issue in *Frame*:

> I doubt that the type of compelled speech at issue here can be justified on any basis. Nonetheless, I do not reach the majority's stringent associational rights standard because I believe that no justification can be found, even under the less exacting criteria adopted by the Supreme Court in evaluating the permissibility of regulation of commercial speech [in Central Hudson] . . . . While the government has a general interest in the health of the beef industry, it does not follow that the government has a substantial interest in compelling the beef industry to make and support such a promotion campaign. Instead, . . . the messages represent the economic interests of one segment of the population . . . .

Id. at 1146-1147 (Sloviter, J., dissenting) (citations and internal quotations omitted).

As in *Frame*, the Government here argues that it has a sufficient interest in increasing the demand for an agricultural product. Moreover, the Government contends that it has an interest in decreasing its obligation to purchase dairy products under the price support program, 7 U.S.C § 1446. We previously have emphasized, however, that the Court's subsequent holding in *United Foods* that clarified and limited the teachings of *Glickman*, cut away the underpinning of this court's analysis in Frame. United Foods makes clear that the government may not compel individuals to support an advertising program for the sole purpose of increasing demand for that product. 533 U.S. at 415. In *United Foods*, the Court concluded that the Mushroom Act's compelled subsidies would be unconstitutional even under the lesser scrutiny accorded to commercial speech. *Id.* at 410.

Although the Government's contention that it has a substantial interest in decreasing its obligation under the dairy price support program is somewhat unique from the government interest asserted in *United Foods*, this interest is undermined by the fact that as a stand-alone statute, the Dairy Act does not operate in conjunction with the price support program. Indeed, producers of liquid milk such as the Cochrans are not covered by the support program. Moreover, reductions in the government's obligations under the price support program are insignificant to the Dairy Promotion Program's existence, as whether the compelled assessments continue is controlled by the dairy producers via the referendum process. 7 U.S.C. § 4506(a).

We conclude, therefore, that the government's interest in promoting the dairy industry is not sufficiently substantial to justify the infringement on the Cochran's First Amendment free speech and association rights. As Judge Sloviter suggested in her dissent in Frame, promotional programs such as the Dairy Act seem to really be special interest legislation on behalf of the industry's interest more so than the govern-

ment's. We believe that the Supreme Court reached the same conclusion by ruling in United Foods that the compelled assessments pursuant to the Mushroom Act are not permitted by the First Amendment.

B.

In light of the reluctance of the Supreme Court in *United Foods* to enter the controversy over the applicable scrutiny for compelled commercial speech cases, however, we will follow suit. "[W]e find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." 533 U.S. at 410.[13]

The compelled assessments for generic dairy advertising under the Dairy Act relate to speech and only to speech. Indeed, "almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *Id.* at 412.

Measured by any degree of scrutiny set forth in the foregoing discussion, we conclude that this case runs on all fours with the teachings and holding of *United Foods*, and accordingly hold that the Dairy Promotion Stabilization Act of 1983 does not survive the First Amendment challenge lodged by Appellants Joseph and Brenda Cochran. The district court erred in sustaining the constitutionality of the Dairy Act on the basis of *Glickman*.

* * * * *

In sum, we conclude that the generic advertising pursuant to the Dairy Promotion Stabilization Act of 1983 does not constitute government speech and is therefore subject to First Amendment scrutiny. We hold that the Dairy Act violates the Cochrans' First Amendment free speech and associational

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[13] We reach this conclusion whether accepting the standard explicitly expressed in Frame or deciding that in view of the Court's discussion in *United Foods*, that standard is not longer controlling.

rights. Although the dairy industry may be subject to a labyrinth of federal regulation, the Dairy Act is a stand-alone law and the compelled assessments for generic dairy advertising are not germane to a larger regulatory purpose other than the speech itself.

The judgment of the district court sustaining the constitutionality of the Dairy Promotion Stabilization Act of 1983 will be reversed and the proceedings remanded with a direction to enter a decree in favor of Appellants in accordance with the foregoing.

CONCURBY: TRENDELL

CONCUR: TRENDELL, *Circuit Judge*, concurring.

I join in our opinion and judgment but write separately to register my view that, having found that the assessments do not pass muster under the Supreme Court's analysis in *United Foods*, and, having noted at the end of Pat IV that the compelled subsidies were assessed to support a program whose principal object was speech itself, we need not engage in the exercise of determining the "standard" regarding the extent of the government's interest for purposes of a commercial speech analysis under Central Hudson, as the opinion does at Part VI-A. Twice—in both *Glickman* and *United Foods*—the Supreme Court has questioned the need for engaging in a Central Hudson analysis.[14] And, I think it

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[14] The Court has not treated these cases as involving a discrete commercial speech issue, instead indicating that "[t]he question is whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." *United Foods*, 533 U.S. at 410; *see also id.* (stating that, even if commercial speech is less protected than other speech, there is "no basis under either *Glickman* or our other precedents to sustain the compelled assessments," but refusing to consider "whether the Government's interest could be considered substantial for purposes of the Central Hudson test"); *Glickman*, 521 U.S. at 474 & n.18 (noting that it was "error for the [Ninth Circuit] to rely on Central Hudson

unnecessary to apply Central Hudson in light of the Court's analysis in United Foods.[15]

In *United Foods* the Court distinguished the situation it faced from the one it considered in *Glickman* by examining the following question: Is the challenged assessment part of a "broader regulatory system" that does not have speech as its primary object. 533 U.S. at 415. There appear to be two parts to this basic inquiry. First, are the plaintiffs part of a group that is "bound together and required . . . to market their products according to cooperative rules?" *Id.* at 412.

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for the purpose of testing the constitutionality of market order assessments for promotional advertising," and stating that the Ninth Circuit "fails to explain why the Central Hudson test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech"). In fact, in United Foods the Court appears to explicitly endorse the applicability of the *Abood/Keller* germaneness test: "It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." 533 U.S. at 413 (citing *Abood* and *Keller*).

[15] The Sixth Circuit, in *Michigan Port Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157 (6th Cir. 2003), also rejected the application of the Central Hudson test to an assessment created by a similar promotional program. I find that court's comments on this matter to be instructive: "[W]e find inapplicable to this case the relaxed scrutiny of commercial speech analysis provided for by Central Hudson, and relied upon by Appellants. The Pork Act does not directly limit the ability of pork producers to express a message; it compels them to express a message with which they do not agree. Even assuming that the advertising funded by the Act is indeed commercial speech, the more lenient standard of review applied to limits on commercial speech has never been applied to speech—commercial or otherwise—that is compelled. It is one thing to force someone to close her mouth; it is quite another to force her to become a mouthpiece." *Id.* at 163 (citation omitted).

Second, is the assessment regulation related to and in furtherance of other nonspeechpurposes, carrying out other aspects to further other economic, societal, or governmental goals? *Id.* at 415. Even if the answer to the first question is "no," the assessment might nonetheless be permitted if it is not only related to speech. This second inquiry could signal consideration of "germaneness" if, in fact, other goals were implicated. But here, we answered "no" to both questions: we decided that the Cochrans did not surrender their freedom to make independent competitive choices to any collective enterprise, and we concluded that speech was the only purpose of the Dairy Act. Thus, it was purely "compelled speech," forbidden by *United Foods* under any level of scrutiny. 533 U.S. at 410. In fact, after discussing the various standards potentially applicable here, Judge Aldisert clearly states in the ensuing Part VI-B that under any level of scrutiny, the assessments for speech only do not pass constitutional muster given *United Foods*. The analysis in Part VI-A regarding the proper level of scrutiny is therefore unnecessary, and, I believe, dicta.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

No. 4:CV-01-0529

JOSEPH P. COCHRAN, *et al.*,
Plaintiffs,

v.

ANN VENEMAN, *et al.*,
Defendants,

and FRED LOVELL, *et al.*,
Intervenor Defendants.

March 24, 2003, Decided

OPINION

This is a declaratory judgment action brought pursuant to 28 U.S.C. §§ 2201 and 2202 and Federal Rule of Civil Procedure 57 by Plaintiffs Joseph S. Cochran and Brenda S. Cochran ("Plaintiffs" or "the Cochrans"). Plaintiffs seek a declaratory judgment ruling that the Dairy Promotion and Research Program ("the Dairy Program") as set forth in Title I, Subtitle B of the Dairy Promotion Stabilization Act of 1983 ("the Stabilization Act" or "the Act"), Pub. L. 98-180, 97 Stat. 1128, 7 U.S.C. § 4504(g) is an unconstitutional restriction on their right to free speech. Plaintiffs also seek an injunction against Ann Veneman, Secretary of the United States Department of Agriculture ("the Secretary") and the National Dairy Promotion and Research Board ("the Dairy Board") (together, "the Governmental Defendants"), enjoining the continued collection of the dairy checkoff assessment created pursuant to the Act.

Some of the advertisements funded by assessments collected pursuant to the provisions of the Stabilization Act currently under attack by Plaintiffs are part of the Milk Mustache/got milk? (R) campaign. The question presented to the Court, phrased in an equally ungrammatical fashion, may be reduced to: "Got Advertising Money for Milk?".

For the reasons that follow, we conclude that the Dairy Program and resulting diary checkoff assessment are not unconstitutional. Our holding will allow the American public to continue to view advertisements containing white mustachioed celebrities and other pop culture icons depicting the salutary effects of milk.

PROCEDURAL HISTORY:

Plaintiffs are dairy producers engaged in the production of milk for commercial use on a dairy farm located in Pennsylvania. They initiated this action by filing a complaint for declaratory and injunctive relief against the Governmental Defendants on April 2, 2002. The case was assigned to the Honorable James F. McClure Jr.

On June 6, 2002, Plaintiffs filed a motion for summary judgment. Thereafter, on June 14, 2002, the Governmental Defendants filed a motion to dismiss, or in the alternative, for summary judgment.

By Order issued August 6, 2002, this matter was transferred to the undersigned.

On January 13, 2003, this Court granted the Petition to Intervene brought by Fred Lovell, Lee Greenwalt, Jackie Root, Earnest Norman, Stephen Marshall, Cecil Moyer, and James Vandblarcom ("the Intervening Parties" or "the Intervenors") on June 14, 2002. The Intervening Parties are dairy producers who, unlike Plaintiffs, support the dairy checkoff provision within the Act and believe it to be constitutional in all respects.

On January 21, 2003, the Intervening Parties filed their own motion for summary judgment.

Each of the pending motions has been fully briefed by the parties. Oral argument was held on March 19, 2003. This matter is now ripe for disposition.

STANDARD OF REVIEW:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."[1] F.R.C.P. 56(c); *see also Turner v. Schering-Plough Corp.*, 901 F.2d 335, 340 (3d Cir. 1990). The party moving for summary judgment bears the burden of showing "there is no genuine issue for trial." *Young v. Quinlan*, 960 F.2d 351, 357 (3d Cir. 1992). Summary judgment should not be granted when there is a disagreement about the facts or the proper inferences which a fact finder could draw from them. *Peterson v. Lehigh Valley Dist. Council*, 676 F.2d 81, 84 (3d Cir. 1982).

Initially, the moving party has a burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). This burden may be met by the moving party pointing out to the court that there is an absence of evidence to support an essential element as to which the non-moving party will bear the burden of proof at trial. *Id.* at 325.

Rule 56 provides that, where such a motion is made and properly supported, the non-moving party must then show by

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[1] We note that the Governmental Defendants filed a motion to dismiss or, in the alternative, one for summary judgment. Because the Governmental Defendants presented matters outside of the pleadings for the Court's consideration within their motion, we will treat the motion as one for summary judgment under Federal Rule of Civil Procedure 56. *See* Fed.R. Civ.P. 12(b).

affidavits, pleadings, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The United States Supreme Court has commented that this requirement is tantamount to the non-moving party making a sufficient showing as to the essential elements of their case that a reasonable jury could find in its favor. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

It is important to note that "the non-moving party cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact." *Pastore v. Bell Tel. Co. of Pa.*, 24 F.3d 508, 511 (3d Cir. 1994) (citation omitted). However, all inferences "should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992) (citations omitted).

"The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). "As to materiality, the substantive law will identify which facts are material." *Id.* at 248. Furthermore, a dispute is genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

STATEMENT OF RELEVANT FACTS:

The history of government involvement in the regulation of milk is an extensive one. "Federal programs have been deeply imbedded in the economic fabric of the United States dairy industry" since the late 1930s. S. Rep. No. 98-163, 13, reprinted in 1983 U.S.C.C.A.N. 1658, 1670.

There are four clearly interrelated federal programs involved:

> 1. The dairy price support program which explicitly puts a floor under the price of manufacturing grade milk and thus maintains a floor under all milk prices.
>
> 2. The milk marketing order program which establishes minimum prices for fluid grade milk in most parts of the country.
>
> 3. Import controls which protect the price support program and keep the U.S. government from supporting world milk prices.
>
> 4. Federal cooperative policy which encourages the development of farmer-owned cooperatives but provides they may not use their market power to raise prices excessively.

Id. "The thrust of these programs has been to deal with the level of milk prices and with problems of instability in milk prices and dairy farm incomes." *Id.*

In 1983, upon finding that "dairy products are basic foods that are a valuable part of the human diet," that "the production of dairy products plays a significant role in the Nation's economy," that "dairy products must be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment," and that "the maintenance and expansion of existing markets for dairy products are vital to the welfare of milk producers and those concerned with marketing, using, and producing dairy products, as well as to the general economy of the Nation," Congress created the Dairy Promotion Program. 7 U.S.C. §§ 4501(a)(1)-(4). In so doing, Congress declared

> that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through

> assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products.

7 U.S.C. § 4501(b).

In accordance with the guidelines set forth within the Stabilization Act, *see* 7 U.S.C. § 4505(b)(1), the Dairy Board was established by an order ("the Dairy Order") issued by the Secretary. *See* 7 C.F.R. § 1150.131(a). Currently, the Dairy Board consists of 36 milk producers, each appointed by the Secretary. *See* 7 C.F.R. § 1150.131(a), 7 C.F.R. § 1150.135; *see* also 7 U.S.C. § 4504(b)(2). Vacancies on the Dairy Board "occasioned by the death, removal, resignation, or disqualification of any member" are filled by the Secretary from a list of nominations made by the Board. 7 C.F.R. § 1150.136.

The powers of the Dairy Board are limited to those enumerated within the Stabilization Act. *See* 7 U.S.C. § 4504(c). Included among those enumerated powers are the authority to "administer the provisions of [the Dairy Order] in accordance with its terms and conditions," 7 C.F.R. 1150.139(b); *see also* 7 U.S.C. § 4504(c)(2), and to

> receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals.

7 C.F.R. § 1150.139(a); *see also* 7 U.S.C. § 4504(c)(1). The Act provides that the Dairy Board will "provide for the establishment and administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related

thereto, for nutrition education projects, and for the disbursement of necessary funds for such purposes." 7 U.S.C. § 4505(a). Advertising created by the Dairy Board must be approved by the Agricultural Marketing Service ("AMS"), the division of the Department of Agriculture to which the Secretary has assigned this congressionally delegated role. (Gov. Defs.' Br. Supp. Summ. J., Ex. A at 1 and P VII(B)).

Of particular relevance to the case at bar, the Stabilization Act contains a provision for assessments which are to be issued to milk producers and thereafter paid to the Dairy Board:

> (g) Assessments
>
> (1) The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall, in the manner as prescribed by the order, collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board.
>
> (2) The assessment shall be used for payment of the expenses in administering the order, with provision for a reasonable reserve, and shall include those administrative costs incurred by the Department after an order has been promulgated under this subchapter.
>
> (3) The rate of assessment for milk produced in the United States and imported dairy products prescribed by the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof, as determined by the Secretary.
>
> (4) A milk producer or the producers' cooperative who can establish that the producer is participating in active, ongoing qualified State or regional dairy product promotion or nutrition education programs

> intended to increase consumption of milk and dairy products generally shall receive credit in determining the assessment due from such producer for contributions to such programs of up to 10 cents per hundredweight of milk marketed or, for the period ending six months after November 29, 1983, up to the aggregate rate in effect on November 29, 1983, of such contributions to such programs (but not to exceed 15 cents per hundredweight of milk marketed) if such aggregate rate exceeds 10 cents per hun= dredweight of milk marketed.
>
> (5) Any person marketing milk of that person's own production directly to consumers shall remit the assessment directly to the Board in the manner prescribed by the order.

7 U.S.C. § 4504(g). The Secretary issued an order in accordance with the Stabilization Act adopting the substance of the provisions listed above. *See* C.F.R. § 1150.152(a), (b) (requiring producers of milk to pay an assessment of 15 cents to the Dairy Board of reach hundredweight of milk marketed commercially). It is these provisions of the Act whose constitutionality are currently under review.

The Dairy Board is empowered to use funds collected through the assessments in order to fulfill its obligations under the Act. *See* 7 U.S.C. § 4504(f); *see also* 7 C.F.R. § 1150.140(i). None of these funds may, however, be utilized "in any manner for the purpose of influencing governmental policy or action" except insofar as those funds are used to make recommendations to the Secretary regarding proposed amendments to the Dairy Order. *See* 7 U.S.C. § 4504(j); *see also* 7 C.F.R. § 150.154.

In 1994, the Dairy Board joined with the United Dairy Industry Association ("UDIA"), a federation of Qualified Programs, in order to create Dairy Management Inc.

("DMI"), a District of Columbia corporation. (Gov. Defs.' Br. Supp. Summ. J., Ex. C P 1). The Dairy Board and UDIA "develop[] their marketing plans and programs through DMI."[2] (Gov. Defs.' Br. Supp. Summ. J., Ex. B at 9). The DMI Board consists of an equal number of dairy farmers from the Dairy Board and the UDIA Board. *Id.* "The goals of DMI are to reduce administrative costs, to have a larger impact on the consumer, and to be better able to drive demand and help increase human consumption of fluid milk and dairy products." *Id.* All advertising created by DMI requires the approval of Dairy Programs, a component of AMS, prior to its dissemination to the public. *See* Mengel Decl. PP 2-3.

Plaintiffs operate a dairy farm in Tioga County, Pennsylvania,[3] where they produce milk for commercial use. They are subject to the Dairy Program's assessment, which costs them approximately $3,500 to $4,000 per year. *See* Cochran Decl. P 8.

The Cochrans operate their dairy farm autonomously using traditional farming methods. They are not members of any dairy cooperative. *See* Compl. P 25. They believe "that the use of sustainable agriculture in the form of less intensive

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[2] In the year 2000, DMI's program of generic promotion included "a full year of fluid milk print advertising through the Milk Mustache/got milk? (R) campaign." (Gov. Defs.' Br. Supp. Summ. J., Ex. B at 21).

[3] A total of eleven federal marketing orders exist for milk. (Gov. Defs.' Br. Supp. Summ. J., Ex. L at 1). Plaintiffs emphasize, however, that Tioga County is not covered by a milk marketing order. *See* Compl. at P 6; *see also* 7 C.F.R. §§ 1001.2, 1033.2.

Still, the fact remains that "handlers regulated under federal milk orders process about 75 percent of all the milk marketed in the U.S." (Gov. Defs.' Br. Supp. Summ. J., Ex. K at 2). Indeed, "in total, more than 96 percent of the fluid eligible milk produced in the United States is priced under a state or federal marketing order." Second Mengel Decl. P 2.

herd management and grazing system makes for a superior milk, promotes a better use of the resources, promotes the environment, and, in sum, provides a healthier product for humans and our planet." Cochran Decl. P 10. Based upon the perceived differences in the farming methods used by the Cochrans and dairy producers at-large, the Cochrans object to the promotion of milk generically as "speech that denies there is any difference in milk." *Id.* P 13.

LEGAL ANALYSIS

Our holding hinges upon a determination of whether the facts in this case more closely parallel those in *Glickman v. Wileman Bros & Elliott*, 521 U.S. 457, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (1997), or in *United States v. United Foods, Inc.*, 533 U.S. 405, 150 L. Ed. 2d 438, 121 S. Ct. 2334 (2001).

In *Wileman*, producers of California tree fruits (including nectarines, plums, and peaches) challenged the constitutionality of regulations contained in marketing orders promulgated by the Secretary of Agriculture which imposed assessments on the producers to cover costs associated with the orders, including generic advertising. *See Wileman*, 521 U.S. at 460. The United States Supreme Court framed the issue before it succinctly: "whether being compelled to fund this advertising raises a First Amendment issue . . . to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve." *Id.* at 468. In deciding upon the latter, the Supreme Court placed emphasis upon the fact that

> California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as part of a broader

> collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

Id. at 469. In conjunction with the applicable statutory scheme, the Court noted three critical characteristics about the marketing orders in effect:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views.

Id. at 469-70. On these grounds, the Supreme Court concluded that the regulation at issue would properly be judged under the standard of review appropriate for economic regulations rather than under the heightened scrutiny applicable to First Amendment issues. *Id.* at 469-70.

Several terms later, in *United Foods*, the Supreme Court considered a challenge to the constitutionality of a statute mandating the issuance of assessments on handlers of fresh mushrooms in order to fund advertising for their products. *See United Foods*, 533 U.S. at 408. In finding that the First Amendment was violated, the Supreme Court outlined the fundamental difference between the facts before it in *United Foods* and those before it in *Wileman*:

> In [*Wileman*] the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.

Id. at 411-12. More specifically, the Supreme Court observed that the rationale of the holding in *Wileman* was premised upon the fact that the nectarine and peach producers "were bound together and required by the statute to market their

products according to cooperative rules," and that "their mandated participation in an advertising program with a particular message was the logical concomitant of a valid scheme of economic regulation." *Id.* at 412. In the case of mushroom handlers, on the other hand, no comparable regulatory scheme existed: there were no marketing orders in place regulating the production and sale of mushrooms, no exemption existed for mushroom producers from antitrust laws, and no encroachments existed upon the ability individual mushroom producers to make their own marketing decisions. *Id.* at 412. In fact, the only regulations affecting mushroom producers were the mandatory assessments which were instituted for the sole purpose of creating and funding generic advertising for mushrooms. *Id.* Therefore, the Court concluded that there was no support for the proposition that the compelled contributions for advertising were part of a broader regulatory scheme whereby the statute would be appropriately relegated to the standard of review applicable to economic regulations as applied in *Wileman*.[4] *Id.* at 415. Instead, the Supreme Court analyzed the assessments under the standard of review appropriate for First Amendment issues and ultimately determined that the assessments were impermissible intrusions upon the mushroom handlers' First Amendment rights. *Id.* at 416.

Based upon the aforementioned decades of regulations affecting the milk industry and milk producers in particular, we conclude that Section 4505(g) of the Stabilization Act is part of a larger regulatory scheme affecting the sale and

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[4] Quoting the Court of Appeals opinion in the case, the Supreme Court recognized that "'the mushroom growing business . . . is unregulated, except for the enforcement of a regional mushroom advertising program,' and 'the mushroom market has not been collectivized, exempted from antitrust laws, subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply.'" *United Foods*, 533 U.S. at 412 (quoting *United States v. United Foods, Inc.*, 197 F.3d 221, 221, 223 (6th Cir. 1991)).

production of milk.[5] On this basis, we find that milk producers are regulated to a similar degree as were the tree fruit growers in *Wileman* and that "the mandated assessments for speech [are] ancillary to a more comprehensive program restricting marketing autonomy."[6] *United Foods*, 533 U.S. at 411.

The remainder of our analysis will accordingly be devoted to whether or not the provisions of the Stabilization Act at issue in this case pass the three part test set out by the Supreme Court in *Wileman*. *See Wileman*, 521 U.S. at 469-70.

a. Whether Section 4504(g) of the Stabilization Act imposes a restraint on the freedom to communicate.

Neither Section 4504(g) of the Stabilization Act, nor any other provision within the Act that we are aware of, imposes a restraint on the Cochrans' (or any other milk producer's) freedom to communicate any message they desire to any audience whatsoever.[7]

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[5] We note, for the sake of clarity and completeness, that in making this determination we have considered the entire regulatory scheme applicable to milk producers as opposed to limiting our analysis to the Stabilization Act alone. *See Gallo Cattle Company v. California Milk Advisory Board*, 185 F.3d 969 (9th Cir. 1999) (where the court considered the entire regulatory scheme affecting milk producers rather than limiting its review to the single milk marketing order being challenged in that case).

[6] We believe that there can be no dispute that milk producers are regulated to a far greater extent than were the mushroom growers in United FoodsUnited Foods.

[7] The fact that the assessments "may indirectly lead to a reduction in a [dairy producer's] individual advertising budget does not itself amount to a restriction on speech." *Wileman*, 521 U.S. at 470.

b. Whether Section 4504(g) of the Stabilization Act compels any person to engage in any actual or symbolic speech.

Section 4504(g) does not compel the Cochrans to engage in any actual or symbolic speech. The mandatory assessments charged to the Cochrans and other milk producers pursuant to the Act, although used to subsidize the generic advertising of milk, are not considered to be "compelled speech."[8] *See Gallo*, 185 F.3d at 976 (citing *Wileman*, 521 U.S. 470-72, 138 L. Ed. 2d 585, 117 S. Ct. 2130). Moreover, the generic advertisements funded by the assessments are attributed to the National Dairy Promotion Board rather than to the Cochrans or any other individual dairy producers. *See* 7 U.S.C. § 4504(c).

c. Whether Section 4504(g) of the Stabilization Act compels dairy producers to endorse or finance any political or ideological views.

Pursuant to the provisions of the Stabilization Act, the Cochrans are obligated to finance advertisements which contain messages to which they object. Specifically, the Cochrans assert that they disagree with the promotion of milk generically as "speech that denies there is any difference in milk."[9] Cochran Decl. P. 13.

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[8] This is because "the use of assessments to pay for advertising does not require [the Cochrans] to repeat an objectionable message out of their own mouths, require them to use their own property to convey and antagonistic ideological message, force them to respond to a hostile message when they would prefer to remain silent, or require them to be publicly identified or associated with another's message." *Wileman*, 521 U.S. 470-471, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (internal citations and quotations omitted).

[9] At oral argument, the Cochrans asserted additional, albeit somewhat imprecise, objections to the content of the advertisements: that the Cochrans prefer more traditional farming methods than those employed

For the sake of deciding upon the pending motions, we assume without holding that the Cochrans' objections are ideological in their nature.

"Assessments to fund a lawful collective program may sometimes be used to pay for [ideological] speech over the objection of some members of the group," *Wileman*, 521 U.S. at 472-3, but only if the advertising funded by those assessments is "germane to the purposes for which compelled association [is] justified." *See id.* at 473; *see also Abood v. Detroit Bd. of Education*, 431 U.S. 230, 235-36, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977); *Gallo*, 185 F.3d at 976.

The Stabilization Act was conceived of as a means of creating "a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products." 7 U.S.C. § 4501(b). "Generic advertising is intended to stimulate consumer demand for an agricultural product in a regulated market." *Wileman*, 521 U.S. at 476. There can be no doubt if the relevant advertising is effective in that it increases the demand for milk, it will have furthered the articulated objectives of the Act. Therefore, we hold that the creation of a generic advertising campaign for milk is germane to the declared purposes of the Stabilization Act.[10]

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by the majority of milk producers and that advertisements may be deemed to promote sexually explicit messages.

[10] It is worth noting that Plaintiffs do not assert that the advertising at issue is in any way false or deceptive. In this regard, Plaintiffs' imprecise "criticisms of generic advertising provide no basis for concluding that factually accurate advertising constitutes an abridgment of anybody's right to speak freely." *Wileman*, 521 U.S. 474, 138 L. Ed. 2d 585, 117 S. Ct. 2130.

CONCLUSION:

It became clear to the Court at oral argument that despite Plaintiffs' efforts to frame their argument within the ambit of the United Foods and Wileman continuum of cases, in reality Plaintiffs are urging this Court to embrace and apply Justice Souter's dissenting opinion in Wileman to the case at bar.[11] To follow Justice Souter's position would necessarily entail applying a standard of review contrary to the holding of Wileman. As a district court, we are bound to apply the law of the land in a manner consistent with Supreme Court jurisprudence. We will not, therefore, disregard controlling precedent.[12]

Accordingly, we find that Section 4504(g) of the Stabilization Act is a species of economic regulation that does not infringe upon the First Amendment rights of the Cochrans. We will deny Plaintiffs' Motion for Summary Judgment and grant both the Governmental Defendants' and the Intervenors' motions for summary judgment.

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[11] Justice Souter would "adhere to the principle laid down in our compelled-speech cases: laws requiring an individual to engage in or pay for expressive activities are reviewed under the same standard that applies to laws prohibiting one from engaging in or paying for such activities. Under the test for commercial speech, the law may be held constitutional only if (1) the interest being pursued by the government is substantial, and (2) the regulation direction advances that interest and (3) is narrowly tailored to serve it." *Wileman*, 521 U.S. 491, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (SOUTER, J., dissenting).

[12] Cognizant that we may be stating the obvious, our holding should be considered apart from any perceived appraisal on our part as to the benefits or harms arising out of the imposition of a generic advertising program funded by assessments charged to milk producers pursuant to the Stabilization Act. Reasonable people can and do differ as to the virtues of such a scheme.

NOW THEREFORE, IT IS ORDERED THAT:

1. Plaintiffs' Motion for Summary Judgment (doc. 2) is denied.

2. The Governmental Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (doc. 9) is granted.

3. The Intervenors' Motion for Summary Judgment (doc. 45) is granted.

4. Plaintiffs' Motion for Leave to Supplement the Record (doc. 62) is granted.

5. The Clerk is directed to close the file on the case.

John E. Jones III
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 03-2522

JOSEPH S. COCHRAN; BRENDA S. COCHRAN,
Appellants,

v.

ANN VENEMAN, Secretary, U.S. Department of Agriculture; NATIONAL DAIRY PROMOTION BOARD, FRED LOVELL; LEE GREENWALT; JACKIE ROOT; EARNEST NORMAN; STEPHEN MASHALL; CECIL MOYER; JAMES VANBLARCOM
Intervenor/Defendants in D.C.

On Appeal from the United States District Court for the Western District of Pennsylvania (D.C. No. 02-cv-00529)
District Jude: The Honorable John E. Jones

Submitted under Third Circuit LAR 34.1(a)
January 12, 2004

SUR PETITION FOR REHEARING
AND HEARING EN BANC

Before: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH CHERTOFF, FISHER and ALDISERT*, *Circuit Judges*

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* Judge Aldisert's vote was limited to panel rehearing only.

The Petition for Rehearing filed by Appellant filed by Appellees and the Petition for Rehearing on behalf of the Intervenors having been submitted to the judges who participate din the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is DENIED.

BY THE COURT

/s/ Ruggero J. Aldisert
RUGGERO J. ALDISERT
Circuit Judge

DATED: May 3, 2004

APPENDIX D

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7 USCS § 4501 (2004)

§ 4501. Congressional findings and declaration of policy

(a) Congress finds that—

(1) dairy products are basic foods that are a valuable part of the human diet;

(2) the production of dairy products plays a significant role in the Nation's economy, the milk from which dairy products are manufactured is produced by thousands of milk producers, and dairy products are consumed by millions of people throughout the United States;

(3) dairy products must be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment;

(4) the maintenance and expansion of existing markets for dairy products are vital to the welfare of milk producers and those concerned with marketing, using, and producing dairy products, as well as to the general economy of the Nation; and

(5) dairy products move in interstate and foreign commerce, and dairy products that do not move in such channels of commerce directly burden or affect interstate commerce of dairy products.

(b) It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and

expand domestic and foreign markets and uses for fluid milk and dairy products. Nothing in this subtitle [7 USCS §§ 4501 *et seq.*] may be construed to provide for the control of production or otherwise limit the right of individual milk producers to produce milk or the right of any person to import dairy products.

§ 4502. Definitions

As used in this subtitle [7 USCS §§ 4501 *et seq.*]—

(a) the term "Board" means the National Dairy Promotion and Research Board established under section 113 of this subtitle [7 USCS § 4504];

(b) the term "Department" means the Department of Agriculture;

(c) the term "Secretary" means the Secretary of Agriculture;

(d) the term "milk" means any class of cow's milk;

(e) the term "dairy products" means products manufactured for human consumption which are derived from the processing of milk, and includes fluid milk products;

(f) the term "fluid milk products" means those milk products normally consumed in liquid form as a beverage;

(g) the term "person" means any individual, group of individuals, partnership, corporation, association, cooperative, or any other entity;

(h) the term "producer" means any person engaged in the production of milk for commercial use;

(i) the term "promotion" means actions such as paid advertising, sales promotion, and publicity to advance the image and sales of and demand for dairy products;

(j) ~~the~~ term "research" means studies testing the effectiveness of market development and promotion efforts, studies

relating to the nutritional value of milk and dairy products, and other related efforts to expand demand for milk and dairy products;

(k) the term "nutrition education" means those activities intended to broaden the understanding of sound nutritional principles including the role of milk and dairy products in a balanced diet;

(l) the term "United States" as used in sections 110 through 117 [7 USCS §§ 4501-4508] means the forty-eight contiguous States in the continental United States;

(m) the term "imported dairy product" means any dairy product that is imported into the United States (as defined in subsection (l)), including dairy products imported into the United States in the form of—

(1) milk, cream, and fresh and dried dairy products;

(2) butter and butterfat mixtures;

(3) cheese; and

(4) casein and mixtures;

(n) the term "importer" means a person that imports an imported dairy product into the United States; and

(o) the term "Customs" means the United States Customs Service.

§ 4503. Issuance of orders

(a) Notice and opportunity for public comment. During the period beginning with the date of enactment of this subtitle [enacted Nov. 29, 1983] and ending thirty days after receipt of a proposal for an initial dairy products promotion and research order, the Secretary shall publish such proposed order and give due notice and opportunity for public comment upon the proposed order. The proposal for an order may be submitted by an organization certified under section

114 of this subtitle [7 USCS § 4505] or by any interested person affected by the provisions of this subtitle [7 USCS §§ 4501 *et seq.*].

(b) Effective date of orders. After notice and opportunity for public comment are given, as provided for in subsection (a) of this section, the Secretary shall issue a dairy products promotion and research order. Such order shall become effective not later than ninety days following publication of the proposal.

(c) Amendment of orders. The Secretary may, from time to time, amend a dairy products promotion and research order.

(d) Order implementation and international trade obligations. The Secretary, in consultation with the United States Trade Representative, shall ensure that the order is implemented in a manner consistent with the international trade obligations of the Federal Government.

§ 4504. Required terms in orders

Any order issued under this subtitle [7 USCS §§ 4501 *et seq.*] shall contain terms and conditions as follows:

(a) The order shall provide for the establishment and administration of appropriate plans or projects for advertisement and promotion of the sale and consumption of dairy products, for research projects related thereto, for nutrition education projects, and for the disbursement of necessary funds for such purposes. Any such plan or project shall be directed toward the sale and marketing or use of dairy products to the end that the marketing and use of dairy products may be encouraged, expanded, improved, or made more acceptable. No such advertising or sales promotion program shall make use of unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product.

(b) National Dairy Promotion and Research Board.

(1) The order shall provide for the establishment and appointment by the Secretary of a National Dairy Promotion and Research Board that shall consist of not less than thirty-six members.

(2) Except as provided in paragraph (6), the members of the Board shall be milk producers appointed by the Secretary from nominations submitted by eligible organizations certified under section 114 of this subtitle [7 USCS § 4505], or, if the Secretary determines that a substantial number of milk producers are not members of, or their interests are not represented by, any such eligible organization, then from nominations made by such milk producers in the manner authorized by the Secretary.

(3) In making such appointments, the Secretary shall take into account, to the extent practicable, the geographical distribution of milk production volume throughout the United States.

(4) In determining geographic representation, whole States shall be considered as a unit.

(5) A region may be represented by more than one director and a region may be made up of more than one State.

(6) Importers.

(A) Initial representation. In making initial appointments to the Board of importer representatives, the Secretary shall appoint 2 members who represent importers of dairy products and are subject to assessments under the order.

(B) Subsequent representation. At least once every 3 years after the initial appointment of importer representatives under subparagraph (A), the Secretary shall review the average volume of domestic production of dairy products compared to

the average volume of imports of dairy products into the United States during the previous 3 years and, on the basis of that review, shall reapportion importer representation on the Board to reflect the proportional share of the United States market by domestic production and imported dairy products.

(C) Additional members; nominations. The members appointed under this paragraph—

(i) shall be in addition to the total number of members appointed under paragraph (2); and

(ii) shall be appointed from nominations submitted by importers under such procedures as the Secretary determines to be appropriate.

(7) The term of appointment to the Board shall be for three years with no member serving more than two consecutive terms, except that initial appointments shall be proportionately for one-year, two-year, and three-year terms.

(8) The Board shall appoint from its members an executive committee whose membership shall equally reflect each of the different regions in the United States in which milk is produced as well as importers of dairy products.

(9) The executive committee shall have such duties and powers as are conferred upon it by the Board.

(10) Board members shall serve without compensation, but shall be reimbursed for their reasonable expenses incurred in performing their duties as members of the Board including a per diem allowance as recommended by the Board and approved by the Secretary.

(c) The order shall define the powers and duties of the Board that shall include only the powers enumerated in this section. These shall include, in addition to the powers set forth elsewhere in this section, the powers to (1) receive and

evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals, (2) administer the order in accordance with its terms and provisions, (3) make rules and regulations to effectuate the terms and provisions of the order, (4) receive, investigate, and report to the Secretary complaints of violations of the order, and (5) recommend to the Secretary amendments to the order. The Board shall solicit, among others, research proposals that would increase the use of fluid milk and dairy products by the military and by persons in developing nations, and that would demonstrate the feasibility of converting surplus nonfat dry milk to casein for domestic and export use.

(d) The order shall provide that the Board shall develop and submit to the Secretary for approval any promotion, research, or nutrition education plan or project and that any such plan or project must be approved by the Secretary before becoming effective.

(e) Budgets.

(1) Preparation and submission. The order shall require the Board to submit to the Secretary for approval budgets on a fiscal period basis of its anticipated expenses and disbursements in the administration of the order, including projected costs of dairy products promotion and research projects.

(2) Foreign market efforts. The order shall authorize the Board to expend in the maintenance and expansion of foreign markets an amount not to exceed the amount collected from United States producers for a fiscal year. Of those funds, for each of the 2002 through 2007 fiscal years, the Board's budget may provide for the expenditure of revenues available to the Board to

develop international markets for, and to promote within such markets, the consumption of dairy products produced or manufactured in the United States.

(f) The order shall provide that the Board, with the approval of the Secretary, may enter into agreements for the development and conduct of the activities authorized under the order as specified in subsection (a) and for the payment of the cost thereof with funds collected through assessments under the order. Any such agreement shall provide that (1) the contracting party shall develop and submit to the Board a plan or project together with a budget or budgets that shall show estimated costs to be incurred for such plan or project, (2) the plan or project shall become effective upon the approval of the Secretary, and (3) the contracting party shall keep accurate records of all of its transactions, account for funds received and expended, and make periodic reports to the Board of activities conducted, and such other reports as the Secretary or the Board may require.

(g) Assessments.

(1) The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall, in the manner as prescribed by the order, collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board.

(2) The assessment shall be used for payment of the expenses in administering the order, with provision for a reasonable reserve, and shall include those administrative costs incurred by the Department after an order has been promulgated under this subtitle [7 USCS §§ 4501 *et seq.*].

(3) The rate of assessment for milk produced in the United States and imported dairy products prescribed by

the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof, as provided by the Secretary.

(4) A milk producer or the producer's cooperative who can establish that the producer is participating in active, ongoing qualified State or regional dairy product promotion or nutrition education programs intended to increase consumption of milk and dairy products generally shall receive credit in determining the assessment due from such producer for contributions to such programs of up to 10 cents per hundredweight of milk marketed or, for the period ending six months after the date of enactment of this Act [enacted Nov. 29, 1983], up to the aggregate rate in effect on the date of enactment of this Act [enacted Nov. 29, 1983] of such contributions to such programs (but not to exceed 15 cents per hundredweight of milk marketed) if such aggregate rate exceeds 10 cents per hundredweight of milk marketed.

(5) Any person marketing milk of that person's own production directly to consumers shall remit the assessment directly to the Board in the manner prescribed by the order.

(6) Importers.

(A) In general. The order shall provide that each importer of imported dairy products shall pay an assessment to the Board in the manner prescribed by the order.

(B) Time for payment. The assessment on imported dairy products shall be paid by the importer to Customs at the time the entry documents are filed with Customs. Customs shall remit the assessments to the Board. For purposes of this subparagraph, the term "importer" includes persons who hold title to foreign-produced dairy products immediately upon release by Customs, as well as persons who act on behalf of

others, as agents, brokers, or consignees, to secure the release of dairy products from Customs.

(C) Use of assessments on imported dairy products. Assessments collected on imported dairy products shall not be used for foreign market promotion.

(h) The order shall require the Board to (1) maintain such books and records (which shall be available to the Secretary for inspection and audit) as the Secretary may prescribe, (2) prepare and submit to the Secretary, from time to time, such reports as the Secretary may prescribe, and (3) account for the receipt and disbursement of all funds entrusted to it.

(i) The order shall provide that the Board, with the approval of the Secretary, may invest, pending disbursement under a plan or project, funds collected through assessments authorized under this subtitle [7 USCS §§ 4501 *et seq.*] only in obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

(j) The order shall prohibit any funds collected by the Board under the order from being used in any manner for the purpose of influencing governmental policy or action except as provided by subsection (c)(5).

(k) The order shall require that each importer of imported dairy products, each person receiving milk from farmers for commercial use, and any person marketing milk of that person's own production directly to consumers, maintain and make available for inspection such books and records as may be required by the order and file reports at the time, in the manner, and having the content prescribed by the order. Such information shall be made available to the Secretary as is appropriate to the administration or enforcement of this

subtitle [7 USCS §§ 4501 *et seq.*], or any order or regulation issued under this subtitle [7 USCS §§ 4501 *et seq.*]. All information so obtained shall be kept confidential by all officers and employees of the Department, and only such information so obtained as the Secretary deems relevant may be disclosed by them and then only in a suit or administrative hearing brought at the request of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving the order with reference to which the information to be disclosed was obtained. Nothing in this subsection may be deemed to prohibit (1) the issuance of general statements, based upon the reports, of the number of persons subject to an order or statistical data collected therefrom, which statements do not identify the information furnished by any person, or (2) the publication, by direction of the Secretary, of the name of any person violating any order, together with a statement of the particular provisions of the order violated by such person. No information obtained under the authority of this subtitle [7 USCS §§ 4501 *et seq.*] may be made available to any agency or officer of the Federal Government for any purpose other than the implementation of this subtitle [7 USCS §§ 4501 *et seq.*] and any investigatory or enforcement action necessary for the implementation of this subtitle [7 USCS §§ 4501 *et seq.*]. Any person violating the provisions of this subsection shall, upon conviction, be subject to a fine of not more than $ 1,000, or to imprisonment for not more than one year, or both, and, if an officer or employee of the Board or the Department, shall be removed from office.

(l) The order shall provide terms and conditions, not inconsistent with the provisions of this subtitle [7 USCS §§ 4501 *et seq.*], as necessary to effectuate the provisions of the order.

§ 4505. Certification of organizations

(a) The eligibility of any organization to represent milk producers, and to participate in the making of nominations under section 113 of this subtitle [7 USCS § 4504] shall be certified by the Secretary. The Secretary shall certify any organization that the Secretary determines meets the eligibility criteria established by the Secretary under this section and the Secretary's determination as to eligibility shall be final.

(b) Certification shall be based, in addition to other available information, on a factual report submitted by the organization, which shall contain information deemed relevant and specified by the Secretary, including, but not limited to, the following:

(1) geographic territory covered by the organization's active membership;

(2) nature and size of the organization's active membership including the proportion of the total number of active milk producers represented by the organization;

(3) evidence of stability and permanency of the organization;

(4) sources from which the organization's operating funds are derived;

(5) functions of the organization; and

(6) the organization's ability and willingness to further the aims and objectives of this subtitle [7 USCS §§ 4501 *et seq.*].

The primary considerations in determining the eligibility of an organization shall be whether its membership consists primarily of milk producers who produce a substantial volume of milk and whether the primary or overriding interest of the organization is in the production or processing

of fluid milk and dairy products and promotion of the nutritional attributes of fluid milk and dairy products.

§ 4506. Requirement of referendum

(a) Within the sixty-day period immediately preceding September 30, 1985, the Secretary shall conduct a referendum among producers who, during a representative period (as determined by the Secretary), have been engaged in the production of milk for commercial use for the purpose of ascertaining whether the order then in effect shall be continued. Such order shall be continued only if the Secretary determines that it has been approved by not less than a majority of the producers voting in the referendum, who during a representative period (as determined by the Secretary) have been engaged in the production of milk for commercial use. If continuation of the order is not approved by a majority of the producers voting in the referendum, the Secretary shall terminate collection of assessments under the order within six months after the Secretary determines that such action is favored by a majority of the producers voting in the referendum and shall terminate the order in an orderly manner as soon as practicable after such determination.

(b) The Secretary shall be reimbursed from assessments collected by the Board for any expenses incurred by the Department in connection with the conduct of any referendum under this section and section 116 [7 USCS § 4507], except for the salaries of Government employees.

§ 4507. Suspension and termination of orders

(a) After September 30, 1985, the Secretary shall, whenever the Secretary finds that any order issued under this subtitle [7 USCS §§ 4501 *et seq.*] or any provision thereof obstructs or does not tend to effectuate the declared policy of this subtitle [7 USCS §§ 4501 *et seq.*], terminate or suspend the operation of such order or such provisions thereof.

(b) After September 30, 1985, the Secretary may conduct a referendum at any time, and shall hold a referendum on request of a representative group comprising 10 per centum or more of the number of producers and importers subject to the order, to determine whether the producers and importers favor the termination or suspension of the order. The Secretary shall suspend or terminate collection of assessments under the order within six months after the Secretary determines that suspension or termination of the order is favored by a majority of the producers voting in the referendum who, during a representative period (as determined by the Secretary), have been engaged in the production of milk for commercial use and importers voting in the referendum (who have been engaged in the importation of dairy products during the same representative period, as determined by the Secretary) and shall terminate the order in an orderly manner as soon as practicable after such determination.

(c) The termination or suspension of any order, or any provision thereof, shall not be considered an order within the meaning of this subtitle [7 USCS §§ 4501 *et seq.*].

§ 4508. Cooperative association representation

Whenever, under the provisions of this subtitle [7 USCS §§ 4501 *et seq.*], the Secretary is required to determine the approval or disapproval of producers, the Secretary shall consider the approval or disapproval by any cooperative association of producers, engaged in a bona fide manner in marketing milk or the products thereof, as the approval or disapproval of the producers who are members of or under contract with such cooperative association of producers. If a cooperative association of producers elects to vote on behalf of its members, such cooperative association shall provide each producer, on whose behalf the cooperative association is expressing approval or disapproval, a description of the question presented in the referendum together with a statement of

the manner in which the cooperative association intends to cast its vote on behalf of the membership. Such information shall inform the producer of procedures to follow to cast an individual ballot should the producer so choose within the period of time established by the Secretary for casting ballots. Such notification shall be made at least thirty days prior to the referendum and shall include an official ballot. The ballots shall be tabulated by the Secretary and the vote of the cooperative association shall be adjusted to reflect such individual votes.

§ 4509. Petition and review

(a) Any person subject to any order issued under this subtitle [7 USCS §§ 4501 *et seq.*] may file with the Secretary a petition stating that any such order or any provision of such order or any obligation imposed in connection therewith is not in accordance with law and requesting a modification thereof or an exemption therefrom. The petitioner shall thereupon be given an opportunity for a hearing on the petition, in accordance with regulations issued by the Secretary. After such hearing, the Secretary shall make a ruling on the petition, which shall be final if in accordance with law.

(b) The district courts of the United States in any district in which such person is an inhabitant or carries on business are hereby vested with jurisdiction to review such ruling, if a complaint for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had on the Secretary by delivering a copy of the complaint to the Secretary. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires.

§ 4510. Enforcement

(a) Restraining order; civil action; minor violation. The district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating, any order or regulation made or issued under this subtitle [7 USCS §§ 4501 *et seq.*]. Any civil action authorized to be brought under this subsection shall be referred to the Attorney General for appropriate action, except that the Secretary is not required to refer to the Attorney General minor violations of this subtitle [7 USCS §§ 4501 *et seq.*] whenever the Secretary believes that the administration and enforcement of this subtitle [7 USCS §§ 4501 *et seq.*] would be adequately served by suitable written notice or warning to any person committing such violation.

(b) Civil penalties. Any person who willfully violates any provision of any order issued by the Secretary under this subtitle [7 USCS §§ 4501 *et seq.*] shall be assessed a civil penalty by the Secretary of not more than $ 1,000 for each such violation and, in the case of a willful failure to pay, collect, or remit the assessment as required by the order, in addition to the amount due, a penalty equal to the amount of the assessment on the quantity of milk as to which the failure applies. The amount of any such penalty shall accrue to the United States and may be recovered in a civil suit brought by the United States.

(c) Availability of other remedies. The remedies provided in subsections (a) and (b) of this section shall be in addition to, and not exclusive of, other remedies that may be available.

§ 4511. Investigations; power to subpoena and take oaths and affirmations; aid of courts

The Secretary may make such investigations as the Secretary deems necessary for the effective administration of this subtitle [7 USCS §§ 4501 *et seq.*] or to determine

whether any person subject to the provisions of this subtitle [7 USCS §§ 4501 *et seq.*] has engaged or is about to engage in any act that constitutes or will constitute a violation of any provision of this subtitle [7 USCS §§ 4501 *et seq.*] or of any order, or rule or regulation issued under this subtitle [7 USCS §§ 4501 *et seq.*]. For the purpose of such investigation, the Secretary may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any records that are relevant to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States. In case of contumacy by, or refusal to obey a subpoena to, any person, the Secretary may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of records. The court may issue an order requiring such person to appear before the Secretary to produce records or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. Process in any such case may be served in the judicial district in which such person is an inhabitant or wherever such person may be found.

§ 4512. Administrative provisions

(a) Nothing in this subtitle [7 USCS §§ 4501 *et seq.*] may be construed to preempt or supersede any other program relating to dairy product promotion organized and operated under the laws of the United States or any State.

(b) The provisions of this subtitle [7 USCS §§ 4501 *et seq.*] applicable to orders shall be applicable to amendments to orders.

§ 4513. Authorization of appropriations

There are hereby authorized to be appropriated such funds as are necessary to carry out the provisions of this subtitle [7 USCS §§ 4501 *et seq.*]. The funds so appropriated shall not be available for payment of the expenses or expenditures of the Board in administering any provisions of any order issued under the terms of this subtitle [7 USCS §§ 4501 *et seq.*]

§ 4514. Dairy reports

The Secretary of Agriculture shall submit to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry the following reports:

(1) Not later than July 1, 1984, a report on the effect of applying, nationally, standards similar to the current California standards for fluid milk products in their final consumer form, as they would relate to—

(A) consumer acceptance, overall consumer consumption trends, and total per capita consumption;

(B) nutritional augmentation, particularly for young and older Americans;

(C) implementing improved interagency enforcement of minimum standards to prevent consumer fraud and deception;

(D) multiple component pricing for producer milk;

(E) reduced Commodity Credit Corporation purchases;

(F) consistency of product quality throughout the year and between marketing regions of the United States; and

(G) consumer prices.

(2) Not later than December 31, 1984, a report on (A) recommendations for changes in the application of the parity formula to milk so as to make the formula more consistent with modern production methods and with special attention to the cost of producing milk as a result

of changes in productivity, and (B) the feasibility of imposing a limitation on the total amount of payments and other assistance a producer of milk may receive during a year under section 201(d) of the Agricultural Act of 1949 (7 U.S.C. 1446(d)) [7 USCS § 1446(d)].

(3) Not later than April 15, 1985, a report on the effectiveness of the paid diversion program carried out under section 201(d) of the Agricultural Act of 1949 [7 USCS § 1446(d)].

(4) Not later than July 1, 1985, and July 1 of each year after the date of enactment of this title [enacted Nov. 29, 1983], an annual report describing activities conducted under the dairy products promotion and research order issued under subtitle B of title I of this Act [7 USCS §§ 4501 *et seq.*], and accounting for the receipt and disbursement of all funds received by the National Dairy Promotion and Research Board under such order including an independent analysis of the effectiveness of the program.

APPENDIX E

TITLE 7—AGRICULTURE

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

CHAPTER X—AGRICULTURAL MARKETING SERVICE (MARKETING AGREEMENTS AND ORDERS; MILK), DEPARTMENT OF AGRICULTURE

PART 1150—DAIRY PROMOTION PROGRAM

SUBPART—DAIRY PROMOTION AND RESEARCH ORDER

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§ 1150.101 Act.

Act means Title I, Subtitle B, of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128, as approved November 29, 1983, and any amendments thereto.

§ 1150.102 Department.

Department means the United States Department of Agriculture.

§ 1150.103 Secretary.

Secretary means the Secretary of Agriculture of the United States or any other officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

§ 1150.104 Board.

Board means the National Dairy Promotion and Research Board established pursuant to § 1150.131.

§ 1150.105 Person.

Person means any individual, group of individuals, partnership, corporation, association, cooperative or other entity.

§ 1150.106 United States.

United States means the 48 contiguous States in the continental United States.

§ 1150.107 Fiscal period.

Fiscal period means the calendar year or such other annual period as the Board may determine.

§ 1150.108 Eligible organization.

Eligible organization means any organization which has been certified by the Secretary pursuant to § § 1150.270 through 1150.278 of this part.

§ 1150.109 Qualified State or regional program.

Qualified State or regional program means any State or regional dairy product promotion, research or nutrition education program which is certified as a qualified program pursuant to.

§ 1150.110 Producer.

Producer means any person engaged in the production of milk for commercial use.

§ 1150.111 Milk.

Milk means any class of cow's milk produced in the United States.

§ 1150.112 Dairy products.

Dairy products means products manufactured for human consumption which are derived from the processing of milk, and includes fluid milk products.

§ 1150.113 Fluid milk products.

Fluid milk products means those milk products normally consumed in liquid form as a beverage.

§ 1150.114 Promotion.

Promotion means actions such as paid advertising, sales promotion, and publicity to advance the image and sales of, and demand for, dairy products generally.

§ 1150.115 Research.

Research means studies testing the effectiveness of market development and promotion efforts, studies relating to the nutritional value of milk and dairy products, and other related efforts to expand demand for dairy products.

§ 1150.116 Nutrition education.

Nutrition education means those activities intended to broaden the understanding of sound nutritional principles, including the role of milk and dairy products in a balanced diet.

§ 1150.117 Plans and projects.

Plans and projects means promotion, research and nutrition education plans, studies or projects pursuant to § § 1150.139, 1150.140 and 1150.161.

§ 1150.118 Marketing.

Marketing means the sale or other disposition in commerce of dairy products.

§ 1150.119 Cooperative association.

Cooperative association means any cooperative marketing association of producers which is organized under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act".

§ 1150.131 Establishment and membership.

(a) There is hereby established a National Dairy Promotion and Research Board of thirty-six members. For purposes of nominating producers to the Board, the United States shall be divided into thirteen geographic regions and the number of Board members from each region shall be as follows:

(1) Two members from region number one comprised of the following States: Washington and Oregon.

(2) Seven members from region number two comprised of the following State: California.

(3) Three members from region number three comprised of the following States: Arizona, Colorado, Idaho, Montana, Nevada, Utah, and Wyoming.

(4) Three members from region number four comprised of the following States: Arkansas, Kansas, New Mexico, Oklahoma and Texas.

(5) Two members from region number five comprised of the following States: Minnesota, North Dakota and South Dakota.

(6) Five members from region number six comprised of the following State: Wisconsin.

(7) Two members from region number seven comprised of the following States: Illinois, Iowa, Missouri, and Nebraska.

(8) One member from region number eight comprised of the following States: Alabama, Kentucky, Louisiana, Mississippi and Tennessee.

(9) Three members from region number nine comprised of the following States: Indiana, Michigan, Ohio and West Virginia.

(10) One member from region number ten comprised of the following States: Florida, Georgia, North Carolina, South Carolina and Virginia.

(11) Three members from region number eleven comprised of the following States: Delaware, Maryland, New Jersey and Pennsylvania.

(12) Three members from region number twelve comprised of the following State: New York.

(13) One member from region number thirteen comprised of the following States: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont.

(b) The Board shall be composed of milk producers appointed by the Secretary either from nominations submitted pursuant to § 1150.133 or in accordance with § 11150.136. A milk producer may be nominated only to represent the region in which such producer's milk is produced.

(c) At least every five years, and not more than every three years, the Board shall review the geographic distribution of milk production volume throughout the United States and, if warranted, shall recommend to the Secretary a reapportionment of regions and/or a modification of the number of members from regions in order to best reflect the geographic distribution of milk production volume in the United States.

(d) The number of members for each region which shall serve on the Board shall be determined by dividing the total pounds of milk produced in the United States for the calendar year previous to the date of review by 36 which provides a factor of pounds of milk per member, and then dividing the total pounds of milk for each region by such factor.

(e) In determining the volume of milk produced in the United States, the Board and the Secretary shall utilize the information received by the Board pursuant to § 1150.171 and data published by the Department.

§ 1150.132 Term of office.

(a) The members of the Board shall serve for terms of three years, except that the members appointed to the initial Board shall serve proportionately, for terms of one, two and three years.

(b) Each member of the Board shall serve until October 31 of the year in which his/her term expires, except that a retiring member may serve until a successor is appointed.

(c) No member shall serve more than two consecutive terms.

§ 1150.133 Nominations.

Nominations for members of the Board shall be made in the following manner:

(a) Upon effectuation of this provision, the Secretary shall solicit nominations for the initial Board from all eligible organizations. If the Secretary determines that a substantial number of producers are not members of, or their interests are not represented by, such eligible organizations, the Secretary shall also solicit nominations from such producers through general farmer organizations or by other means.

(b) After the appointment of the initial Board, the Secretary shall announce at least 120 days in advance when a Board member's term is expiring and shall solicit nominations for that position in the manner described in paragraph (a) of this section. Nominations for such position should be submitted to the Secretary not less than 60 days prior to the expiration of such term.

(c) An eligible organization may submit nominations only for positions on the Board that represent regions in which such eligible organization can establish that it represents a substantial number of producers. If there is more than one Board position for any such region, the organization may submit nominations for each position.

(d) Where there is more than one eligible organization representing producers in a specific region, they may caucus and jointly nominate producers for each position representing that region on the Board for which a member is to be appointed. If joint agreement is not reached with respect to any such nominations, or if no caucus is held, each eligible organization may submit to the Secretary nominations for each appointment to be made to represent that region.

§ 1150.134 Nominee's agreement to serve.

Any producer nominated to serve on the Board shall file with the Secretary at the time of the nomination a written agreement to:

(a) Serve on the Board if appointed;

(b) Disclose any relationship with any organization that operates a qualified State or regional program or has a contractual relationship with the Board; and

(c) Withdraw from participation in deliberations, decision-making, or voting on matters where paragraph (b) applies.

§ 1150.135 Appointment.

From the nominations made pursuant to § 1150.133, the Secretary shall appoint the members of the Board on the basis of representation provided for in § 1150.131(a).

§ 1150.136 Vacancies.

To fill any vacancy occasioned by the death, removal, resignation, or disqualification of any member of the Board, the Secretary shall appoint a successor from the most recent list of nominations for the position or from nominations made by the Board.

§ 1150.137 Procedure.

(a) A majority of the members shall constitute a quorum at a properly convened meeting of the Board. Any action of the Board shall require the concurring votes of at least a majority of those present and voting. The Board shall establish rules concerning timely notice of meetings.

(b) The Board may take action upon the concurring votes of a majority of its members by mail, telephone, or telegraph when in the opinion of the chairman of the Board such action must be taken before a meeting can be called. Action taken by this emergency procedure is valid only if all members are notified and provided the opportunity to vote and any telephone vote is confirmed promptly in writing. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Board.

§ 1150.138 Compensation and reimbursement.

The members of the Board shall serve without compensation but shall be reimbursed for necessary and reasonable expenses, including a per diem allowance as recommended by the Board and approved by the Secretary, incurred by them in the performance of their duties under this subpart.

§ 1150.139 Powers of the Board.

The Board shall have the following powers:

(a) To receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals;

(b) To administer the provisions of this subpart in accordance with its terms and provisions;

(c) To make rules and regulations to effectuate the terms and provisions of this subpart;

(d) To receive, investigate, and report to the Secretary complaints of violations of the provisions of this subpart;

(e) To disseminate information to producers or eligible organizations through programs or by direct contact utilizing the public postage system or other systems;

(f) To select committees and subcommittees of Board members, and to adopt such rules for the conduct of its business as it may deem advisable;

(g) To establish advisory committees of persons other than Board members and pay the necessary and reasonable expenses and fees of the members of such committees;

(h) To recommend to the Secretary amendments to this subpart; and

(i) With the approval of the Secretary, to invest, pending disbursement pursuant to a plan or project, funds collected through assessments authorized under § 1150.152 in, and only in, obligations of the United States or any agency thereof, in general obligations of any State or any political subdivision thereof, in any interest-bearing account or certificate of deposit of a bank that is a member of the Federal Reserve System, or in obligations fully guaranteed as to principal and interest by the United States.

§ 1150.140 Duties of the Board.

The Board shall have the following duties:

(a) To meet not less than annually, and to organize and select from among its members a chairman and such other officers as may be necessary;

(b) To appoint from its members an executive committee whose membership shall equally reflect each of the different regions in the United States in which milk is produced, and to delegate to the committee authority to administer the terms and provisions of this subpart under the direction of the Board and within the policies determined by the Board;

(c) To appoint or employ such persons as it may deem necessary and define the duties and determine the compensation of each;

(d) To review all programs that promote milk and dairy products on a brand or trade name basis that have requested certification pursuant to § 1150.153, and to recommend to the Secretary whether such request should be granted;

(e) To develop and submit to the Secretary for approval, promotion, research, and nutrition education plans or projects resulting from research or studies conducted either by the Board or others;

(f) To solicit, among other proposals, research proposals that would increase the use of fluid milk and dairy products by the military and by persons in developing nations, and that would demonstrate the feasibility of converting surplus nonfat dry milk to casein for domestic and export use;

(g) To prepare and submit to the Secretary for approval, budgets on a fiscal period basis of its anticipated expenses and disbursements in the administration of this subpart, including probable costs of promotion, research and nutrition education plans or projects, and also including a general description of the proposed promotion, research and nutrition education programs contemplated therein;

(h) To maintain such books and records, which shall be available to the Secretary for inspection and audit, and prepare and submit such reports from time to time to the Secretary as the Secretary may prescribe, and to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it;

(i) With the approval of the Secretary, to enter into contracts or agreements with national, regional or State dairy promotion and research organizations or other organizations or entities for the development and conduct of activities

authorized under §§ 1150.139 and 1150.161, and for the payment of the cost thereof with funds collected through assessments pursuant to § 1150.152. Any such contract or agreement shall provide that:

(1) The contractors shall develop and submit to the Board a plan or project together with a budgets or budget which shall show the estimated cost to be incurred for such plan or project;

(2) Any such plan or project shall become effective upon approval of the Secretary; and

(3) The contracting party shall keep accurate records of all of its transactions and make periodic reports to the Board of activities conducted and an accounting for funds received and expended, and such other reports as the Secretary or the Board may require. The Secretary or employees of the Board may audit periodically the records of the contracting party;

(j) To prepare and make public, at least annually, a report of its activities carried out and an accounting for funds received and expended;

(k) To have an audit of its financial statements conducted by a certified public accountant in accordance with generally accepted auditing standards, at least once each fiscal period and at such other times as the Secretary may request, and to submit a copy of each such audit report to the Secretary;

(l) To give the Secretary the same notice of meetings of the Board, committees of the Board and advisory committees as is given to such Board or committee members in order that the Secretary, or a representative of the Secretary, may attend such meetings;

(m) To submit to the Secretary such information pursuant to this subpart as may be requested; and

(n) To encourage the coordination of programs of promotion, research and nutrition education designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States.

§ 1150.151 Expenses.

(a) The Board is authorized to incur such expenses (including provision for a reasonable reserve) as the Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. However, after the first full year of operation of the order, administrative expenses incurred by the Board shall not exceed 5 percent of the projected revenue of that fiscal year. Such expenses shall be paid from assessments collected pursuant to § 1150.152.

(b) The Board shall reimburse the Secretary, from assessments collected pursuant to § 1150.152, for administrative costs incurred by the Department after May 1, 1984.

§ 1150.152 Assessments.

(a) Each person making payment to a producer for milk produced in the United States and marketed for commercial use shall collect an assessment on all such milk handled for the account of the producer at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof and shall remit the assessment to the Board.

(b) Any producer marketing milk of that producer's own production in the form of milk or dairy products to consumers, either directly or through retail or wholesale outlets, shall remit to the Board an assessment on such milk at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof.

(c) In determining the assessment due from each producer pursuant to § 1150.152 (a) and (b), a producer who is participating in a qualified State or regional program(s) shall receive a credit for contributions to such program(s), but not to exceed the following amounts:

(1) In the case of contributions for milk marketed on or before May 31, 1984, up to the actual rate of contribution that was in effect under such program(s) on November 29, 1983, not to exceed 15 cents per hundredweight of milk marketed.

(2) In all other cases, the credit shall not exceed 10 cents per hundredweight of milk marketed.

(d) In order for a producer described in § 1150.152(a) to receive the credit authorized in § 1150.152(c), either the producer or a cooperative association on behalf of the producer must establish to the person responsible for remitting the assessment to the Board that the producer is contributing to a qualified State or regional program. Producers who contribute to a qualified program directly (other than through a payroll deduction) must establish with the person responsible for remitting the assessment to the Board, with validation by the qualified program, that they are making such contributions.

(e) In order for a producer described in § 1150.152(b) to receive the credit authorized in § 1150.152(c), the producer and the applicable qualified State or regional program must establish to the Board that the producer is contributing to a qualified State or regional program.

(f) The collection of assessments pursuant to § 1150.152(a) and (b) shall begin with respect to milk marketed on and after the effective date of this section and shall continue until terminated by the Secretary. If the Board is not constituted by the date the first assessments are to be collected, the Secretary shall have the authority to receive the assessments on behalf of the Board. The Secretary shall remit such assessments to the Board when it is constituted.

(g) Each person responsible for the remittance of the assessment pursuant to § 1150.152(a) and (b) shall remit the assessment to the Board not later than the last day of the month following the month in which the milk was marketed.

(h) Money remitted to the Board shall be in the form of a negotiable instrument made payable to "National Dairy Promotion and Research Board." Remittances and reports specified in § 1150.171 shall be mailed to the location designated by the Secretary or the Board.

§ 1150.153 Qualified State or regional dairy product promotion, research or nutrition education programs.

(a) Any organization which conducts a State or regional dairy product promotion, research or nutrition education program may apply to the Secretary for certification of qualification so that producers may receive credit pursuant to § 1150.152(c) for contributions to such program.

(b) In order to be certified by the Secretary as a qualified program, the program must:

(1) Conduct activities as defined in §§ 1150.114, 1150.115, and 1150.116 that are intended to increase consumption of milk and dairy products generally;

(2) Except for programs operated under the laws of the United States or any State, have been active and ongoing before enactment of the Act;

(3) Be financed primarily by producers, either individually or through cooperative associations;

(4) Not use a private brand or trade name in its advertising and promotion of dairy products unless the Board recommends and the Secretary concurs that such preclusion should not apply;

(5) Certify to the Secretary that any requests from producers for refunds under the program will be honored by

forwarding to either the Board or a qualified State or regional program designated by the producer that portion of such refunds equal to the amount of credit that otherwise would be applicable to that program pursuant to § 1150.152(c); and

(6) Not use program funds for the purpose of influencing governmental policy or action.

(c) An application for certification of qualifications of any State or regional dairy product promotion, research or nutrition education program which does not satisfy the requirements specified in paragraph (b) of this section shall be denied. The certification of any qualified program which fails to satisfy the requirements specified in paragraph (b) of this section after certification shall be subject to suspension or termination.

(1) Prior to the denial of an application for certification of qualification, or the suspension or termination of an existing certification, the Director of the Dairy Division shall afford the applicant or the holder of an existing certification an opportunity to achieve compliance with the requirements for certification within a reasonable time, as determined by the Director.

(2) Any State or regional dairy product promotion, research or nutrition education program whose application for certification of qualification is to be denied, or whose certification of qualification is to be suspended or terminated shall be given written notice of such pending action and shall be afforded an opportunity to petition the Secretary for a review of the action. The petition shall be in writing and shall state the facts relevant to the matter for which the review is sought, and whether petitioner desires an informal hearing. If an informal hearing is not requested, the Director of the Dairy Division shall issue a final decision setting forth the action to be taken and the basis for such action. If petitioner requests a hearing, the Director of the Dairy Division, or a person

designated by the Director, shall hold an informal hearing in the following manner:

(i) Notice of a hearing shall be given in writing and shall be mailed to the last known address of the petitioner or of the State or regional program, or to an officer thereof, at least 20 days before the date set for the hearing. Such notice shall contain the time and place of the hearing and may contain a statement of the reason for calling the hearing and the nature of the questions upon which evidence is desired or upon which argument may be presented. The hearing place shall be as convenient to the State or regional program as can reasonably be arranged.

(ii) Hearings are not to be public and are to be attended only by representatives of the petitioner or the State or regional program and of the U.S. Government, and such other parties as either the State or regional program or the U.S. Government desires to have appear for purposes of submitting information or as counsel.

(iii) The Director of the Dairy Division, or a person designated by the Director, shall be the presiding officer at the hearing. The hearing shall be conducted in such manner as will be most conducive to the proper disposition of the matter. Written statements or briefs may be filed by the petitioner or the State or regional program, or other participating parties, within the time specified by the presiding officer.

(iv) The presiding officer shall prepare preliminary findings setting forth a recommendation as to what action should be taken and the basis for such action. A copy of such findings shall be served upon the petitioner or the State or regional program by mail or in person. Written exceptions to the findings may be filed within 10 days after service thereof.

(v) After due consideration of all the facts and the exceptions, if any, the Director of the Dairy Division shall issue a final decision setting forth the action to be taken and the basis for such action.

§ 1150.154 Influencing governmental action.

No funds collected by the Board under this subpart shall in any manner be used for the purpose of influencing governmental policy or action, except to recommend to the Secretary amendments to this subpart.

§ 1150.155 Adjustment of accounts.

Whenever the Board or the Department determines through an audit of a person's reports, records, books or accounts or through some other means that additional money is due the Board or that money is due such person from the Board, such person shall be notified of the amount due. The person shall then remit any amount due the Board by the next date for remitting assessments as provided in § 1150.152. Overpayments shall be credited to the account of the person remitting the overpayment and shall be applied against amounts due in succeeding months.

§ 1150.156 Charges and penalties.

(a) Late-payment charge. Any unpaid assessments to the Board pursuant to § 1150.152 shall be increased 1.5 percent each month beginning with the day following the date such assessments were due. Any remaining amount due, which shall include any unpaid charges previously made pursuant to this section, shall be increased at the same rate on the corresponding day of each month thereafter until paid. For the purpose of this section, any assessment that was determined at a date later than prescribed by this subpart because of a person's failure to submit a report to the Board when due shall be considered to have been payable by the date it would have been due if the report had been filed when due. The timeliness of a payment to the Board shall be based on the applicable postmark date or the date actually received by the Board, whichever is earlier.

(b) Penalties. Any person who willfully violates any provision of this subpart shall be assessed a civil penalty by the Secretary of not more than $1,000 for each such violation and, in the case of a willful failure to pay, collect, or remit the assessment as required by this subpart, in addition to the amount due, a penalty equal to the amount of the assessment on the quantity of milk as to which the failure applies. The amount of any such penalty shall accrue to the United States and may be recovered in a civil suit brought by the United States. The remedies provided in this section shall be in addition to, and not exclusive of, other remedies that may be available by law or in equity.

§ 1150.161 Promotion, research and nutrition education.

(a) The Board shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any plans or projects authorized in §§ 1150.139, 1150.140 and this section. Such plans or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate plans or projects for promotion, research and nutrition education with respect to milk and dairy products; and

(2) The establishment and conduct of research and studies with respect to the sale, distribution, marketing and utilization of milk and dairy products and the creation of new products thereof, to the end that marketing and utilization of milk and dairy products may be encouraged, expanded, improved or made more acceptable. Included shall be research and studies of proposals intended to increase the use of fluid milk and dairy products by the military and by persons in developing nations and proposals intended to demonstrate the feasibility of converting nonfat dry milk to casein for domestic and export use.

(b) Each plan or project authorized under § 1150.161(a) shall be periodically reviewed or evaluated by the Board to

insure that the plan or project contributes to an effective program of promotion, research and nutrition education. If it is found by the Board that any such plan or project does not further the purposes of the Act, the Board shall terminate such plan or project.

(c) No plan or project authorized under § 1150.161(a) shall make use of unfair or deceptive acts or practices with respect to the quality, value or use of any competing product.

§ 1150.171 Reports.

Each producer marketing milk of that producer's own production directly to consumers and each person making payment to producers and responsible for the collection of the assessment under § 1150.152 shall be required to report at the time for remitting assessments to the Board such information as may be required by the Board or by the Secretary. Such information may include but not be limited to the following:

(a) The quantity of milk purchased, initially transferred or which, in any other manner, are subject to the collection of the assessment;

(b) The amount of assessment remitted;

(c) The basis, if necessary, to show why the remittance is less than the number of hundredweights of milk multiplied by 15 cents; and

(d) The date any assessment was paid.

§ 1150.172 Books and records.

Each person who is subject to this subpart, and other persons subject to § 1150.171, shall maintain and make available for inspection by employees of the Board and the Secretary such books and records as are necessary to carry out the provisions of this subpart and the regulations issued hereunder, including such records as are necessary to verify

any reports required. Such records shall be retained for at least two years beyond the fiscal period of their applicability.

§ 1150.173 Confidential treatment.

All information obtained from such books, records or reports under the Act and this subpart shall be kept confidential by all persons, including employees and former employees of the Board, all officers and employees and all former officers and employees of the Department, and by all officers and all employees and all former officers and employees of contracting agencies having access to such information, and shall not be available to Board members. Only those persons having a specific need for such information in order to effectively administer the provisions of this subpart shall have access to such information. In addition, only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the discretion, or upon the request, of the Secretary, or to which the Secretary or any officer of the United States is a party, and involving this subpart. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected therefrom, which statements do not identify the information furnished by any person; and

(b) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this subpart, together with a statement of the particular provisions of the subpart violated by such person.

§ 1150.181 Proceedings after termination.

(a) Upon the termination of this subpart, the Board shall recommend not more than five of its members to the Secretary to serve as trustees for the purpose of liquidating the affairs of the Board. Such persons, upon designation by

the Secretary, shall become trustees of all the funds and property owned, in the possession of, or under the control of the Board, including unpaid claims or property not delivered or any other claim existing at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Board under any contract or agreements entered into by it pursuant to § 1150.140(i);

(3) From time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and of the trustees, to such persons as the Secretary may direct; and

(4) Upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such persons full title and right to all of the funds, property, and claims vested in the Board or the trustees pursuant to this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to this subpart shall be subject to the same obligation imposed upon the Board and upon the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be used, to the extent practicable, in the interest of continuing one or more of the promotion, research or nutrition education plans or projects authorized pursuant to this subpart.

§ 1150.182 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this subpart or of any regulation issued

pursuant hereto, or the issuance of any amendment to either thereof, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen or which may hereafter arise in connection with any provision of this subpart or any regulation issued thereunder;

(b) Release or extinguish any violation of this subpart or any regulation issued thereunder; or

(c) Affect or impair any rights or remedies of the United States, or of the Secretary, or of any person, with respect to any such violation.

§ 1150.183 Personal liability.

No member or employee of the Board shall be held personally responsible, either individually or jointly, in any way whatsoever to any person for errors in judgment, mistakes, or other acts of either commission or omission of such member or employee, except for acts of dishonesty or willful misconduct.

§ 1150.184 Patents, copyrights, inventions and publications.

Any patents, copyrights, trademarks, inventions or publications developed through the use of funds collected under the provisions of this subpart shall be the property of the U.S. Government as represented by the Board, and shall, along with any rents, royalties, residual payments, or other income from the rental, sale, leasing, franchising, or other uses of such patents, copyrights, inventions, or publications, inure to the benefit of the Board. Upon termination of this subpart, § 1150.181 shall apply to determine disposition of all such property.

§ 1150.185 Amendments.

The Secretary may from time to time amend provisions of this part. Any interested person or organization affected by the provisions of the Act may propose such amendments to the Secretary.

§ 1150.186 Separability.

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby.

§ 1150.187 Paperwork Reduction Act assigned number.

The information collection and recordkeeping requirements contained in §§ 1150.133, 1150.152, 1150.153, 1150.171, 1150.172, 1150.202, 1150.204, 1150.205, 1150.211 and 1150.273 of these regulations (7 CFR Part 1150) have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB Control Number 0581-0147.

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Jun. 14, 2002]

No. 3:02cv00529
(Judge McClure)

JOSEPH S. COCHRAN, *et al.*,
Plaintiffs,

v.

ANN M. VENEMAN, Secretary of Agriculture, *et al.*,
Defendants.

Pursuant to LR 56.1, defendants hereby state that there is no genuine issue to be tried as to the following material facts:

1. The economics of the dairy industry are governed by two "distinctive and essential phenomena." *Zuber v. Allen*, 396 U.S. 168, 172 (1969).

2. Milk can be used as "a fluid staple of daily consumer diet" or as "an ingredient in manufactured dairy products such as butter and cheese." *Id.*

3. "Milk used in the consumer market has traditionally commanded a premium price, even though it is of no higher quality than milk used for manufacture." *Id.*

4. Dairy cows are more productive in the summer than in the winter. *Id.* at 172-73.

5. Because the demand for fluid milk is relatively constant throughout the year, milk producers must maintain herds that are sufficiently large to "supply winter needs;" their doing so results in "oversupply in the more fruitful months." *Id.* at 173.

6. Over the years, the above phenomena have led to "disorderly marketing conditions and depressed prices." *Smyser v. Block*, 760 F.2d 5 14, 5 15 (3d Cir. 1985).

7. To "restore order to the market and boost the purchasing power of farmers," Congress has taken repeated action. *See, eg., Zuber*, 396 U.S. at 174-76.

8. In 1949, Congress created a federal price support program for milk. Agricultural Act of 1949, ch. 792, § 201, 63 Stat. 1052.

9. The creation of the price support program arose from concern that the "extraordinary demands for American agricultural production during the war period ha[d] largely ceased to exist." *See* S. Rep. No. 8 1-1091 at 1, *reprinted in* 1949 U.S.C.C.A.N. 2407, 2408.

10. In creating the price support program for milk, Con gress authorized the Secretary of Agriculture (the "Secretary") to purchase butter, natural cheddar cheese, and nonfat dry milk at announced prices through the Commodity Credit Corporation, a federal corporation within the Department of Agriculture. S. Rep. No. 98-163 at 12-13, *reprinted in* 1983 U.S.C.C.A.N. 1658, 1669-70; *see* 15 U.S.C. § 714.

11. The purpose of the purchases was to "explicitly put[] a floor under the price of manufacturing grade milk and thus maintain[] a floor under all milk prices." S. Rep. No. 98-163 at 13.

12. By 1983, the price support program for milk had succeeded in "fulfill[ing] its goal of providing adequate supplies of wholesome and nutritious fluid milk and dairy products at reasonable prices to the consumer and at minimum cost to the taxpayer." *Id.*

13. However, "recent years ha[d] seen milk production far outpace demand, leaving the Government to purchase unacceptable and increasing amounts of surplus dairy products."

Id.

14. Efforts on the part of the dairy industry to solve the problem had been limited and unsuccessful. *See id.* at 14-15.

15. To "further stimulate demand for fluid milk and dairy products," and thus to reduce the amount of milk, butter and cheese that the government would have to buy, Congress created the Dairy Promotion Program in 1983. Dairy Production Stabilization Act of 1983, Pub. L. No. 98- 180, tit. I, subtit. B, 97 Stat. 1136 (the "Stabilization Act") (codified as amended at 7 U.S.C. §§ 4501-4514); *see* S. Rep. No. 98-163 at 18, 19.

16. The idea for the Dairy Promotion Program came from producer groups. *See* S. Rep. No. 98-163 at 18.

17. In creating the Dairy Promotion Program, Congress found that "dairy products are a valuable part of the human diet;" that "the production of dairy products plays a significant role in the Nation's economy;" that "dairy products must be readily available and marketed efficiently to ensure that the people of the United States receive adequate nourishment;" and that the maintenance and expansion of existing markers for dairy products are vital to the welfare of milk producers and those concerned with marketing, using, and producing dairy products, as well as to the general economy of the Nation." 7 U.S.C. § 4501(a)(l)-(4).

18. Based on these findings, Congress declared it to be "in the public interest" for the Nation to have "an orderly procedure for financing (through assessments on all milk produced in the United States) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States." Stabilization Act § 110(b) (codified as amended at 7 U.S.C. § 4501(b)).

19. The Dairy Promotion Program was, and is, one of a series of "federally-authorized checkoff programs" that Congress has created for various agricultural commodities. *See* Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1999S(a)(l), 104 Stat. 3927.

20. In 1990, Congress found that the checkoff programs had "substantially contributed to strengthening markets for the agricultural products covered by the programs." *Id.* § 1999S(a)(3).

21. Reiterating its support for the checkoff programs, Congress found in 1996 that "[g]eneric promotion, research, and information activities for agricultural commodities play a unique role in advancing the demand for such commodities, since such activities increase the total market for a product to the benefit of consumers and all producers." Commodity Promotion, Research, and Information Act of 1996, Pub. L. No. 104-127, tit.V, subtit. B, § 512(a)(4), 110 Stat. 1032.

22. Originally, the scope of the Dairy Promotion Program was limited to producers of milk. *See* Stabilization Act § 113(g).

23. By amendments to the Stabilization Act approved in May 2002 (the "2002 Amendments"), Congress expanded the scope of the Dairy Promotion Program to include importers of dairy products. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 1508, 116 Stat. __.

24. In 1996, Congress approved legislation that would have terminated the price support program for milk effective December 3 1, 1999. Agricultural Market Transition Act, Publ. L. No. 104-127, tit. I, § 141(h), 110 Stat. 915 (1996).

25. Subsequent enactments have extended the termination date for the price support program each time it has approached. *See* notes to 7 U.S.C.A. § 7251 (Supp. 2001).

26. Most recently, the termination date for the price support program has been extended through December 31, 2007. Pub. L. No. 107- 171, § 1501(a).

27. The Stabilization Act prescribes the terms and conditions that govern the Dairy Promotion Program, *see* 7 U.S.C. § 4504, but requires the terms and conditions to be incorporated into a "dairy products promotion and research order" to be issued by the Secretary. *See id.* § 4503(a).

28. Such an order (the "Dairy Order") was issued in March 1984. 49 Fed. Reg. 11806-1.

29. As required by the Stabilization Act, *see* 7 U.S.C. § 4504(b)(l), the Dairy Order establishes the National Dairy Promotion and Research Board (the "Dairy Board"). 7 C.F.R. § 1150.131(a).

30. Pending implementation of the 2002 Amendments, the Dairy Board consists of 36 milk producers, each appointed by the Secretary. *Id.* §§ 1150.131(a), 1150.135; *see* 7 U.S.C. § 4504(b)(2).

31. In addition to appointing the membership of the Dairy Board, the Secretary fills vacancies on the board "occasioned by the death, removal, resignation, or disqualification of any member." 7 C.F.R. § 1150.136.

32. The 2002 Amendments require the membership of the Dairy Board to be expanded to include representatives of persons who import dairy products. Pub. L. No. 107-171, 1505(b)(4) (adding 7 U.S.C. § 4504(b)(6)).

33. The Secretary will appoint these representatives "from nominations submitted by importers under such procedures as the Secretary determines to be appropriate." 7 U.S.C. § 4504(b)(6)(C)(ii).

34. As is further required by the Stabilization Act, *see* 7 U.S.C. § 4504(g)(1), (3), each producer of milk in the 48 contiguous states is required to pay an assessment of 15 cents

to the Dairy Board for each hundredweight of milk marketed commercially. 7 C.F.R. § 1150.152(a), (b).

35. A producer who contributes to a "State or regional dairy promotion, research, or nutrition education program" certified by the Secretary as a "Qualified Program" is entitled to a credit of up to 10 cents per hundredweight against the amount that he or she would otherwise owe to the Dairy Board. *Id.* §§ 1150.152(c), 1150.153(a).

36. Under the 2002 Amendments, importers of dairy products are also required to pay an assessment to the Dairy Board. Pub. L. No. 107-171, § 1505(d).

37. The Dairy Board possesses certain enumerated powers. 7 U.S.C. § 4504(c); 7 C.F.R. § 1150.139.

38. These powers include the authority to "administer the provisions of [the Dairy Order] in accordance with its terms and conditions." 7 C.F.R. § 1150.139(b); *see* 7 U.S.C. § 4504(c)(2).

39. The powers of the Dairy Board also include the authority to "receive and evaluate, or on its own initiative develop, and budget for plans or projects to promote the use of fluid milk and dairy products as well as projects for research and nutrition education and to make recommendations to the Secretary regarding such proposals." 7 U.S.C. § 4504(c)(1); *see* 7 C.F.R. § 1150.139(a).

40. Any "promotion, research, or nutrition plan or project" that the Dairy Board develops must be "approved by the Secretary before becoming effective." 7 U.S.C. § 4504(d); *see* 7 C.F.R. § 1150.140(e).

41. The approval of the Secretary also is required for the budget of the Dairy Board and for any contract or agreement through which the board seeks to develop or implement any of its plans or projects. 7 U.S.C. § 4504(e)(I), (f); *see* 7 C.F.R. § 1150.140(g), (i).

42. With the approval of the Secretary, the Dairy Board may use "funds collected through assessments under the [Dairy Order]" to do its work. *See* 7 U.S.C. 5 4504(f); 7 C.F.R. § 1150.140(i).

43. However, such funds may not be used "for the purpose of influencing governmental policy or action," except for making recommendations to the Secretary concerning the amendment of the Dairy Order. 7 U.S.C. § 4504(j); *see* 7 C.F.R. § 1150.154.

44. The Dairy Board may purchase or develop advertising to promote the sale and consumption of dairy products. *See* 7 U.S.C. § 4504(a).

45. However, no such advertising may make use of "unfair or deceptive acts or practices with respect to the quality, value, or use of any competing product." *Id.*

46. All advertising of the Dairy Board must be approved by the Agricultural Marketing Service ("AMS"), the component of the Department of Agriculture through which the Secretary oversees the activities of the board. Ex. A at 1 & ¶ VII(B).[1]

47. The Secretary must be notified of "meetings of the Board, committees of the Board and advisory committees, in order that the Secretary, or a representative of the Secretary, may attend." 7 C.F.R. § 1150.140(1).

48. The Office of General Counsel ("OGC") of the Department of Agriculture provides "all legal counsel" to the Dairy Board, except as OGC and AMS may otherwise agree. Ex. A ¶ VIII(A).

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[1] References to exhibits are to the exhibits to the brief in support of defendants' motion to dismiss or, in the alternative, for summary judgment.

49. During the 60-day period immediately preceding September 30, 1985, the Secretary was required to hold a referendum of milk producers to determine whether a majority favored continuation of the Dairy Promotion Program. 7 U.S.C. § 4506(a).

50. If a majority did not favor continuation, the Secretary was required to terminate the program. *Id.*

51. Since September 30, 1985, the Secretary has been authorized to conduct additional referenda at any time, and required to do so upon request of a "representative group" consisting of at least 10% of those covered by the Dairy Order. *Id.* § 4507(b).

52. The Diary Promotion Program must be terminated if a majority of those voting in a referendum under § 4507(b) do not support its continuation. *Id.*

53. The Attorney General is authorized to bring suit to enforce any order or regulation made or issued under the Dairy Promotion Program. *Id.* § 4510(a).

54. A civil penalty may be assessed against any person who "willfully violates" any such order. *Id.* §4510(b).

55. The amount of any such penalty "accrue[s] to the United States and may be recovered in a civil suit brought by the United States." *Id.*

56. The price support system for milk is one of a group of "clearly interrelated Federal programs" designed to "deal with the level of milk prices and with problems of instability in milk prices and dairy farm incomes." S. Rep. No. 98-163 at 13.

57. Under the Capper-Volstead Act, ch. 57,42 Stat. 388 (1922), producers of agricultural products, including "dairymen," are permitted to join together into cooperatives to "process, prepare, and market [their] products without fear of

prosecution under the antitrust laws." *United States v. Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *see* 7 U.S.C. § 291.

58. Cooperatives established under the Capper-Volstead Act may fix the prices at which their members' products may be sold, but "may not use their market power to raise prices excessively." S. Rep. No. 98- 163 at 13; *see Dairymen*, 660 F.2d at 194.

59. Under the Agricultural Marketing Agreement Act of 1937, ch. 296,50 Stat. 246, the Secretary issues orders ("marketing orders") that regulate the "handling" of milk and of certain other agricultural commodities and products by processors, associations of producers, and other such "handlers." 7 U.S.C. § 608C(1), (2).

60. With certain exceptions, marketing orders "must be approved by either two thirds of the affected producers or by producers who market at least two-thirds of the volume of the commodity." *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457,461-62 (1997) (citing 7 U.S.C. § 608c(9)(B)).

61. Because marketing orders "displace[] competition" in the markets to which they apply, they are "expressly exempted from the antitrust laws." *Glickman*, 521 U.S. at 461 (citing 7 U.S.C. § 608b).

62. Marketing orders for milk "classify milk according to its ultimate use" and, subject to certain adjustments, "fix uniform minimum prices" that handlers must pay for each of the classes. *Smyser*, 760 F.2d at 516.

63. The effect of the marketing orders for milk is to "establish[] minimum prices for fluid grade milk in most parts of the country." S. Rep. No. 98-163 at 13.

64. Under ch. 4 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202, the importation of milk, cheese, and other dairy products is restricted by a system of

import controls, i.e., tariffs and quotas. *See. e.g.*, 7 C.F.R. pt. 6, "Subpart—Dairy Tariff-Rate Import Quota Licensing," apps. 1-3 (listing the quotas).

65. These import controls are enforced, in part, through a system of licensing administered by the Department of Agriculture. *See* 7 C.F.R. § 6.20(b).

66. The purpose of the import controls is to "protect the price support system and keep the U.S. Government from supporting world milk prices." S. Rep. No. 98-163 at 13.

67. Under the Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. __, the Secretary is authorized to make cash payments to participating dairy producers for months through September 2005 in which milk prices fall below a certain level. Pub. L. No. 107-171, § 1502; *see* H. Conf. Rep. No. 107-424, Joint Explanatory Statement of the Committee of Conference, tit. I, § 36.

68. These payments are intended to compensate dairy producers for market losses caused by low prices. *See* Pub. L. No. 107-171, caption to § 1502.

69. The United Dairy Industry Association ("UDIA") is a federation of Qualified Programs. Ex. B at 9.

70. In 1994, the Dairy Board joined with UDIA to create Dairy Management Inc. ("DMI"), a District of Columbia corporation. Ex. C ¶ 1.

71. Through DMI, the Dairy Board and UDIA have merged their separate staffs to form "a single staff that serves both organizations." Ex. D.

72. The merger of the staffs has permitted the Dairy Board and UDIA to develop and implement their marketing plans and programs on a joint basis since January 1, 1995. Ex. B at 9.

73. The board that controls DMI consists of the membership of the Dairy Board plus the membership of the UDIA board. *Id.*

74. The budget and annual plan of DMI cannot be implemented without the approval of the Dairy Board. *Id.*

75. DMI conducts an extensive program of generic advertising on behalf of fluid milk. *See id.* at 20-23.

76. In doing so, DMI works with the National Fluid Milk Processor Promotion Board, the body that administers the Processor-Funded Fluid Milk Program, 7 U.S.C. §§ 6401-6417, a checkoff program separate from the Dairy Promotion Program. *Id.* at 20.

77. In 2000, the advertising for which DMI was responsible included "a full year of fluid milk print advertising through the Milk Mustache/got milk?® campaign." *Id.* at 21.

78. In addition to conducting an extensive program of generic advertising on behalf of milk, DMI conducts another such program on behalf of cheese. *Id.* at 10.

79. Other activities of DMI include the funding of scientific and technical research supportive of its marketing efforts. *Id.* at 9.

80. In 2000, DMI conducted this research through six Dairy Foods Research Centers, two Nutrition and Health Research Institutes, and 72 competitively-bid research contracts. *Id.* at 9, 89-95.

81. All advertising that DMI creates or wishes to use requires the advance approval of Dairy Programs, a component of AMS, before the advertising may be disseminated to the public. Mengel Decl. ¶ 2.

82. The normal practice of Dairy Programs is to "attend meetings, participate in conference calls, and review materials to address any concerns that [Dairy Programs] may have

with DMI staff members in the developmental stage of advertisements. *Id.*

83. On a consistent basis, DMI has altered its advertising to meet Dairy Programs' concerns. *Id.*

84. No advertising to which Dairy Programs has objected has ever been used by DMI until the concerns of Dairy Programs have been addressed. *Id.*

85. In 1998, a new televison commercial, entitled "Paws," was developed by the California Fluid Milk Processor Advisory Board ("CFMPAB") for use in the "got milk?" campaign. Ex. E at 1.

86. Intended to be humorous, the commercial featured a "milk-deprived grandmother" forced to give her cat non-dairy creamer when she found that she had run out of milk. *Id.* at 2; Ex. F.

87. At the time the commercial was produced, CFMPAB did not submit its advertising to Dairy Programs for pre-production review. *See* Ex. E at 3.

88. Wishing to broadcasting the commercial, DMI sought the approval of Dairy Programs. *See* Ex. G.

89. Approval was denied. *Id.*

90. In the judgment of Dairy Programs, the commercial portrayed non-dairy creamer as "an inferior product when substituted for milk" and was "potentially disparaging" to soybeans, an ingredient often used in the production of non-dairy creamer. *Id.*

91. Based on these findings, Dairy Programs declared the commercial to be "not appropriate for use in light of Departmental regulations and guidelines" and prohibited the use of any assessment funds from the Dairy Promotion Program "concerning this ad." *Id.*

92. Seeking reversal of this decision, CFMPAB and DMI submitted letters to Dairy Programs in which they sought to respond to the concerns that Dairy Programs had raised. Ex. E at 2-4; Ex. F.

93. In addition, CFMPAB and DMI obtained the support of the chief executive officer of the United Soybean Board, who submitted a letter in which he said that he "did not find [the commercial] in any way disparaging to soybeans or the soybean industry." Ex. H.

94. To prevent recurrence of the problem, CFMPAB agreed to submit, "through DMI, storyboards of all future commercials available for licensing," so that Dairy Programs could provide its input "*before* production dollars are invested and while adjustments can still be made." Ex. E at 3 (emphasis in the original).

95. After consideration of these materials and consultation with officials in AMS, including the Administrator's office and other commodity promotion groups, Dairy Programs changed its position. Mengel Decl. ¶ 3.

96. DMI was permitted to proceed with the airing of the commercial "with the stipulation that if opposition was raised, the commercial would be removed from television." *Id.*

97. At the time that the Dairy Order was issued, nearly 20 billion pounds of dairy surplus existed. *See* Ex. I at 2.

98. Storage of the surplus required the government to maintain warehouses containing millions of pounds of surplus products. *See. e.g., United States v. Crown Equip. Corp.*, 86 F.3d 700, 701-02 (7th Cir. 1996) (involving such a warehouse).

99. "Today, even though milk production continues to rise, there is little surplus." Ex. I at 2.

100. In 1980, the average person consumed 523 pounds of milk on a total solids basis. *Id.*

101. In 2000, the average person consumed more than 584 pounds, an increase of more than 11%. *See id.*

102. In 1997, the Nation's 226 dairy cooperatives marketed 127.4 billion pounds of milk, or 83% of all of the milk sold in the United States to plants and dealers. Ex. J, abstract.

103. Approximately 75% of "all the milk marketed in the U.S." is processed by handlers regulated under federal milk marketing orders. Ex. K at 2.

104. The 11 federal marketing orders for milk cover most of the contiguous 48 states. *See* Ex. L at 1.

105. In 1985, the Secretary conducted a referendum under 7 U.S.C. § 4506(a) to determine whether the Dairy Promotion Program should be continued. Ex. M.

106. Continuation of the program was favored by 89.7% of the dairy farmers who voted in the referendum. *Id.*

107. In 1993, the Secretary conducted another referendum to determine whether the Dairy Promotion Program should be continued. Ex. N; see 7 U.S.C. § 4507(b).

108. The referendum was held "after [the Department of Agriculture] received petitions with over 16,000 signatures requesting [such] a referendum." Ex. N.

109. Of those who voted in the referendum, 71.4% favored continuation of the program. *Id.*

Dated: June 13, 2002

Respectfully submitted,

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APPENDIX G

[Logo] Dairy Programs

Milk Marketing Order Statistics
Quantities and Utilization of Regulated Milk -Description

Each month, fluid milk processors (handlers) who are regulated under the Federal milk order (FMO) program are required to file a report of milk receipts and utilization (R & U Report) with the order's market administrator (MA). The R & U Report shows, for the month, the quantities of milk and milk products received by the handler and how this milk was used in the handler's plant. The R & U Report is used by the MA to determine the pool obligations of the handler. The MA also uses the report to generate summary market statistics for the order, which are filed with the Market Information Branch (MIB) in Dairy Programs. The MIB compiles a summary report of the individual order statistics and disseminates this information.

The market statistics presented in this section are: the number of producers (dairy farmers) whose raw milk is delivered to regulated handlers; the amount, measured in pounds, of raw milk received by regulated handlers from producers; the component (butterfat, nonfat solids, protein (true), and other solids) tests of this raw producer milk; and, the somatic cell count (a measure of milk quality) of this raw producer milk. Other market statistics include the regulated handlers' utilization, again measured in pounds, of this raw producer milk in the four classes of milk use established under the order. These classes are: I, fluid milk products (products intended to be used as a beverage); II, principally cream products, cottage cheese, ice cream and related products, and other food uses; III, hard and spreadable cheeses; and IV, butter and dried milk products.

Following is a brief description of some terms used in FMO statistics. For a detailed description of these and other terms, see the specific FMO provisions in the Code of Federal Regulations.

Marketing Area.

A marketing area is an area designated in a Federal milk order's provisions within which the handling of milk is regulated by the order. Generally, the size of the marketing area is determined by the sales territory of competing handlers. The recent consolidation of orders also looked at overlapping areas of milk supply, the number of handlers within the area, natural boundaries, cooperative association service areas, common regulatory provisions, and milk utilization in common dairy products.

Producer.

A producer is usually any dairy farmer who sells milk to a pool handler. Producers must produce milk in compliance with Grade A inspection requirements, and their milk must be either received at a pool plant or diverted to a nonpool plant for the account of a pool handler. Producer-handlers are not producers.

Handler.

A handler is a person—an individual, partnership, corporation, association, or other business unit, that is subject to the provisions of an order. A handler can be an operator of a plant that is approved by a duly constituted regulatory agency for the handling of Grade A milk. A handler also can be a milk distributor or a broker. A cooperative association that does not operate a plant can be a handler.

Pool Handler.

A pool handler is a handler that is subject in full to the provisions of the order. A pool handler can be an operator of a plant that meets the minimum performance standards

included in each order, a pool plant. Such plants include distributing plants, plants primarily engaged in processing packaged fluid milk products, and supply plants, plants primarily engaged in producing manufactured dairy products. A cooperative association that does not operate a plant can be a pool handler. A milk distributor or broker cannot be a pool handler.

Receipts of Milk.

FMO statistics include volumes of milk received by handlers regulated under each of the Federal orders. Receipts of milk principally come from producers. The volume of milk that is reported as received by handlers from producers includes all such milk regardless of where it may be sold. Milk identified as that received from producers for a given market may come directly from nearby producers or from producers associated with a supply plant which, although located several hundred miles from the marketing area, is pooled on the market. Producer milk also may include milk that is diverted by a pool plant operator to another pool plant or to a nonpool plant.

Handlers regulated under Federal milk orders process about 75 percent of all the milk marketed in the U.S. Given this, and the claim that FMO market statistics are both comprehensive and accurate, one common use of these monthly statistics is to gauge milk marketing trends in the U.S. by making year-to-year comparisons of specific statistics. The following should be kept in mind in making these comparisons. First, the reform and consolidation of Federal milk orders that occurred on January 1, 2000, resulted in significant changes to the marketing areas of some orders, and thus the handlers regulated by the new order. In some cases, previously unregulated area and thus unregulated handlers were added to an order's purview. Second, in some months, significant amounts of milk, normally associated with some orders, may not be pooled due to disadvantageous class and uniform price relationships. This has not occurred to

as large an extent in recent years. Third, since Federal milk order reform, large volumes of milk have shifted regulation among some orders and large volumes of previously unregulated milk from California have been associated with Federal milk orders. Finally, there were some changes in the classification of milk products that also were included in January 1, 2000, reform and consolidation noted above. While some FMO statistics for some markets remain comparable, one should keep in mind the issues discussed here in assessing the comparability of many FMO statistics.

Go to: *Dairy Programs*

APPENDIX H

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Jun. 24, 2002]

No. 3:02cvO0529
(Judge McClure)

JOSEPH S. COCHRAN, *et al.*,
Plaintiffs,

v.

ANN M. VENEMAN, Secretary of Agriculture, *et al.*,
Defendants.

SECOND DECLARATION
OF JOHN R. MENGEL

JOHN R. MENGEL says:

1. I am the Chief Economist for Dairy Programs, Agricultural Marketing Service (AMS), U.S. Department of Agriculture. I have been employed in Dairy Programs in my current position since 1997. Dairy Programs of AMS is headed by a Deputy Administrator. In the absence of the Deputy Administrator, I act in that position. As Chief Economist, I am responsible for all economic analysis of the Federal Milk Marketing Order Program, and oversee Dairy Market News, Federal Milk Marketing data collection and dissemination, and AMS' oversight of the two national dairy research and promotion programs. The National Dairy Promotion and Research Program is the program being challenged in this case.

2. The federal milk marketing orders are complemented by a number of state marketing orders. Like the federal milk marketing orders, most state marketing orders classify milk

according to its ultimate use and, subject to certain adjustments, fix minimum prices that handlers must pay for each of the classes. State marketing orders exist for many of the regions (e.g., California, Maine, Montana, and parts of New York, Pennsylvania, Virginia, and Nevada) that are not covered by federal marketing orders. In total, more than 96 percent of the fluid eligible milk produced in the United States is priced under a state or federal marketing order.

3. Plaintiffs live in an area not covered by a federal milk marketing order, but choose to sell their milk under a federal order. Many other milk producers who live in areas not covered by federal milk marketing orders do the same thing.

4. I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 21, 2002.

/s/ John R. Mengel
JOHN R. MENGEL

APPENDIX I

GUIDELINES FOR AMS OVERSIGHT OF COMMODITY RESEARCH AND PROMOTION PROGRAMS

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United States Department of Agriculture
Agricultural Marketing Service

GUIDELINES FOR AMS OVERSIGHT OF COMMODITY RESEARCH AND PROMOTION PROGRAMS

Congress has delegated to USDA the responsibility for implementation and oversight of commodity promotion, research, and consumer information programs established under freestanding legislation. The funding for such programs is industry specific, usually through deductions from sales by producers, marketers, and/or importers, and the programs are directed by industry boards[1]. However, the federal legislation which provides the authority for the collection and expenditure of funds also mandates for most of the programs that

[1] References to boards also include councils.

the Secretary of Agriculture appoint the Board members and approve the boards' budgets, plans, projects, and contracts. The latter responsibility has been delegated to AMS.

It is the policy of AMS in carrying out the oversight responsibility to ensure that legislative, regulatory, and Department policy requirements are met. It is not the intent to impose constraints on board operations beyond these requirements. It is appropriate, however, to provide guidance to boards on allocation of funds among programs commensurate with legislative authority. For example, it is AMS policy to support market-oriented research, nutrition research and education, foodservice promotion, and other programs which enhance the marketability of products.

These guidelines are designed to facilitate the application of legislative and regulatory provisions of the acts and orders[2] and to promote uniformity in the Agency's oversight of all commodity promotion and research programs. These guidelines shall be reviewed annually and amended as necessary.

I. *Budget Approval.*

A. USDA will approve all budgets. When submitting budgets to AMS, the boards must include detailed information regarding administrative expenses and written justifications for contract costs. Budget submissions must include, at a minimum, the following components:

1. A statement of objectives and strategy in each major program area (research, advertising, etc.), including reasons for significant changes from the preceding budget period.

---

[2] References to orders also include plans.

2. A summary of anticipated revenue (assessments, interest, donations, etc.) and anticipated refunds, where applicable, with comparative data for at least one preceding year.

3. A summary of proposed expenditures by major program areas, specifying those on a contractual basis, with comparative data for at least one preceding year.

4. Staff and administrative expense breakdown, with comparative data for at least one preceding year.

B. AMS also will approve amendments or additions to approved budgets, including shifting of program funds from one major area to another. Shifts that are consistent with governing bylaws need not have prior approval by AMS.

II. *Contracts.*

A. Contract Approval. AMS will approve written contracts for the development and carrying out of programs or projects of research, development, advertising, promotion, or education and written contracts for legal assistance and other consultants. The contracts will be reviewed for conformance with the provisions required by AMS and the Department—which include language regarding the prohibition on lobbying. Contracts should be approved prior to the start of activities to be carried out under the contract. AMS will require boards to formally notify potential contractors that any work they undertake prior to contract approval by USDA is at their own risk as boards are not financially liable if the contract is not approved by USDA.

B. Contract Compliance. AMS will require boards to monitor contracts for compliance with all provisions, Further, AMS will require boards to ensure that all payments to contractors are allowable and appropriate under the terms of the contract.

III. *Accountability for Financial and Program Progess.*

A. AMS will review financial statements for each accounting period for proper accountability of funds collected and expended. The financial statements should consist of (1) a balance sheet, and (2) an expense budget comparison showing expenditures during the reporting period, year-to-date expenditures, and an unexpended budget.

B. Where refunds are applicable, the financial statement should also include a monthly collection and refund report showing (1) year-to-date collection of assessments, number of requests for refunds, and total assessments refunded, and (2) comparative data for the preceding year, if applicable.

C. AMS will receive copies of annual progress reports on program activities and expenditures.

IV. *Refunds*. (where applicable)

In addition to the refund requirements in the enabling legislation, it is AMS policy that:

A. Boards disseminate procedures for receiving refunds to persons paying assessments.

B. No pressure of any kind to discourage refunds is brought by boards or staff against those seeking refunds.

C. Names of individuals obtaining refunds be kept confidential and made available only to appropriate staff personnel.

D. Refund information released be limited to dollar amount and number of refunders by State, region, or nationwide; however, no information may be released that would in any way readily identify individual persons or firms.

V. *Influencing Legislation and/or Government Policy.*

In the process of monitoring board activities, it is important for AMS to be aware of any actions which may be in conflict with the legislative prohibitions regarding influencing legislative and/or government policy. This prohibition on the use of checkoff funds applies equally to any trade/producer organizations funded wholly or in part by a particular board or contractors to the boards. However, this does not affect a trade/producer organization's ability to lobby with noncheckoff funds. Likewise, there are no restrictions on individual board members, except when acting in an official capacity for the board. The following definitions serve as a guide for commodity divisions.

A. "Influencing of legislation" is defined as:

1. Any attempt to influence any legislation or any attempt to affect the opinions of the general public or any segment thereof concerning legislation; or

2. Any attempt to influence any legislation through communication with any member or employee of a legislative body or with any government official who may participate in the formulation of legislation.

B. "Influencing of governmental policy or action" is defined as any action the principal purpose of which is to bring about a change in existing policy or regulation or affect the outcome of proposed policy or regulation, except those actions which are specifically provided for in the act, order, and/or rules and regulations.

C. These prohibitions do not preclude commodity boards from providing factual information to government officials, provided the information is presented in an unbiased manner and does not state a specific course of action.

VI. *Referendum Activities*

Boards and board members when they are acting in their official capacities are prohibited from attempting to influence voters' views, and no board funds may be expended for that purpose. Boards and board members may publicize referenda and the votable issues, explain their programs, and encourage those covered by the programs to vote.

VII. *Policy on Review and Approval of Promotional and Educational Materials.*

A. AMS will review all plans and projects of commodity boards approving those which are in compliance with the applicable legislative authority.

B. AMS will review (1) all commodity promotional campaigns—advertising, consumer education programs, and other promotional materials—as presented at board meetings or as submitted to AMS and (2) the advertisements or printed materials generated in the campaign.

C. AMS review of nutritional claims will include verification of the supporting data to determine compliance with USDA Agricultural Handbook 8-1, the Dietary Guidelines for Americans, and other pertinent federal regulations where others exists. Any other supporting data must be substantiated by the boards.

D. AMS will disapprove any advertising which it considers to be disparaging to another commodity or in violation of the prohibition against false and misleading advertising contained in the legislation. The commodity divisions will refer any questionable advertisements to the AMS Research and Promotion Functional Committee for review and for their recommendation.

VIII. *Administration.*

A. *Legal Counsel.* USDA's Office of General Counsel (OGC) will provide all legal counsel to the boards, except as may be provided for under a Memorandum of Understanding between the individual boards, AMS, and OGC.

B. *Investments of Funds.* Commodity divisions shall require the boards to follow the AMS investment policy (Appendix 1) to ensure proper investment of board funds.

C. *Audits.* AMS will review annual financial audits performed by certified public accountants to assure that they include statements regarding whether or not (1) funds were used for lobbying, (2) the AMS investment policy was adhered to, (3) internal controls over funds met accounting standards, and (4) funds were used only for projects and other expenses authorized in a budget approved by USDA. All audits of the research and promotion boards must be performed in accordance with either standards issued by the American Institute of Certified Public Accountants or by the General Accounting Office. AMS will require boards to ensure that audits are conducted in accordance with any specific guidelines which may be developed by OIG or others and approved by AMS for use in board audits. AMS will request audit coverage to be extended to include additional activities as needed.

D. *Administrative Reviews.* AMS will conduct periodic administrative reviews of national research and promotion board operations to ensure that adequate records are maintained. Selected areas for examination will include, but not be limited to, travel expenses of board members and staff, contract compliance, and investment of funds.

E. *Bylaws and Policy Statements.* AMS will approve the bylaws and policy statements, and amendments thereto, developed by boards to ensure adequate coverage of

responsibilities, meeting procedures, and travel and related expenses.

F. *Meetings*. AMS will require notification from the boards of all board and committee meetings as well as conference calls. AMS will attend all board meetings and participate in conference calls and committee meetings when deemed necessary by the division.

G. *Board Administrative Expenses*.

1. Recognizing inherent differences in implementing laws or regulations, scope, and funding among commodity promotion and research programs, the Agency expects each board and State association or other organization, authorized by law to receive assessment funding, to establish and maintain the minimum level of annual administrative expenses necessary to efficiently and effectively carry out the programs mandated by law. Each board shall include its annual administrative expenses as a separate item in its annual report. Each State association or other organization may be required to report its annual administrative expenses in a similar manner.

2. The Secretary's costs for oversight of the research and promotion boards described in VII(H) should not be considered as an administrative expense of the boards as these charges are outside the commodity boards' control and management.

3. Board members are not allowed a fee or compensation for board service or expenses for spouses or other family members. Also, board staff is prohibited from claiming any expenses for spouses or other family members.

4. Boards are prohibited from using assessment funds for open bars.

H. *Compliance*. The respective boards are responsible for promptly identifying violations and violators and for securing

compliance with rules and regulations wherever possible. Such procedures shall include a timetable for the referral of compliance cases to AMS for appropriate action. Upon receipt of compliance cases, AMS will:

1. Send a certified letter requesting compliance within a specified period;

2. Advise that collection will be made by administrative offset, if applicable; and

3. Refer violations to the OGC for action.

I. *Charging Research and Promotion Boards.* The research and promotion authorizing legislation requires the various boards to reimburse AMS for its costs in overseeing their programs. It is the policy of AMS that all the research and promotion programs be charged in a fair and equitable manner and that all costs be covered. In this regard, the following costs will be billed to boards:

1. *Direct Program Costs.* These costs include salaries and benefits of employees directly involved in the daily workload associated with research and promotion boards. Other costs would be travel to board meetings, rent for office space for the employees directly working on the research and promotion programs, printing of any documents, supplies, equipment, and anything else needed to complete the necessary work involved in overseeing the programs. All direct program costs should be charged to the appropriate research and promotion programs.

2. *Division Overhead.* The costs incurred by the division director's office or other involved division offices in research and promotion oversight should be charged back to the promotion boards. These costs should be distributed based on the direct program cost. In order to ensure that these costs are readily available for billing,

the distributive subcenters (directors' and administrative offices) should include a percentage charge to research and promotion programs.

As an option, depending on the organization levels—i.e., division, branch, section—involved in supervision of the promotion and research program and the amount of oversight provided, division and branch charges may be included in direct costs.

3. *Agency Overhead.* Agency management costs are spread equally to all programs based on their relative availability and/or reimbursements (currently about 7 percent of availability). Therefore, the costs of agency overhead also should be charged back to the boards.

4. *Other Costs.* The costs billed to AMS by departmental offices for authorized services provided in the support of the various boards should be charged back to the Boards. These include all billed costs to AMS by other agencies of USDA and outside government agencies. Also, costs billed to AMS by States for actual unemployment claims paid to former board employees will be charged back to the boards when the bills are received by AMS.

J. *Nominations for Board Membership.* AMS commodity divisions will establish procedures for nominating members and alternates (if applicable) to the respective boards. It is USDA policy that membership on USDA boards and committees should reflect, to the extent practicable, the diversity of individuals served by the program. AMS encourages representation of women, minorities, and persons with disabilities on the boards.

The nomination package will be submitted to the Office of the Secretary through the Administrator of AMS, in accordance with established timeframes.

K. *Debt Management.* AMS commodity divisions shall be guided by the authorities outlined in AMS Directive 420.3 (Appendix 2) for writing off uncollectible assessments and late fees.

L. *Other Government Agencies.* AMS will be responsible for developing appropriate working relationships with other government agencies which have responsibilities related to these programs. For example, AMS commodity divisions will be responsible for assuring close coordination with the Foreign Agricultural Service (FAS) anytime checkoff funds are used for foreign activities. FAS has oversight responsibility of the Foreign Market Development (FMD) and the Marketing Promotion Programs (MPP), and checkoff funding is made available to some participants in these FAS supervised programs. However, in all cases, FAS must have the opportunity to approve the boards' budgets, plans, and projects that focus on international activities. FAS approval will be subject to compliance with the checkoff legislation as well as other FAS requirements. Likewise, for programs with import checkoff provisions, it is the responsibility of AMS commodity divisions to maintain a close liaison with the U.S. Customs Service. Similarly, as required by section 1999T of the Food, Agriculture, Conservation, and Trade Act of 1990, AMS will consult with the United States Trade Representative on any proposed new or amended research and promotion order or plan which would assess imports.

/s/ [ILLEGIBLE]

Appendix 1—Investment of Public Funds
Appendix 2—Debt Management

APPENDIX J

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

[Filed Jun. 14, 2002]

No. 3:02cv00529
(Judge McClure)

JOSEPH S. COCHRAN, *et al.*,
Plaintiffs,

v.

ANN N. VENEMAN, Secretary of Agriculture, *et al.*,
Defendants.

DECLARATION OF JOHN R. MENGEL

JOHN R. MENGEL says:

1. I am the Chief Economist for Dairy Programs, Agricultural Marketing Service (AMS), U.S. Department of Agriculture. I have been employed in Dairy Programs in my current position since 1997. Dairy Programs of AMS is headed by a Deputy Administrator. In the absence of the Deputy Administrator. I act in that position. As Chief Economist, I am responsible for all economic analysis of the Federal Milk Marketing Order Program, and oversee Dairy Market News, Federal Milk Marketing data collection and dissemination, and AMS' oversight of the two national dairy research and promotion programs. The National Dairy Promotion and Research Program is the program being challenged in this case.

2. All advertising that Dairy Management Inc. (DMI) creates or wishes to use requires advance approval by Dairy Programs before public dissemination. Normal practice is to attend meetings, participate in conference calls, and review

materials to address any concerns that Dairy Programs may have with DMI staff members in the developmental stage of advertisements. Consistently, advertising has been altered by DMI to meet Dairy Programs' concerns. No advertising to which Dairy Programs has objected has ever been used by DMI until the concerns of Dairy Programs have been addressed.

3. In 1998, DMI requested the approval of Dairy Programs to broadcast a television commercial, entitled "Paws," that the California Fluid Milk Processor Advisory Board (CFMPAB) had developed. Initially, approval was denied. Letters addressing the issues in the denial were submitted by staff members of CFMPAB and by DMI, articulating the basis for the content of the commercial. In addition, the Chief Executive Officer of the United Soybean Board wrote a letter allaying the concern of Dairy Programs that the ad was disparaging to soybeans or the soybean industry. After careful consideration of the submitted materials and consultation with officials in AMS, including the Administrator's office and other commodity promotion groups, approval was given by Dairy Programs to proceed with airing the commercial with the stipulation that if opposition was raised, the commercial would be removed from television.

4. I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 7, 2002.

/s/ John R. Mengel
JOHN R. MENGEL

APPENDIX K

United States Department of Agriculture
Agricultural Marketing Service
P.O. Box 96456
Washington, DC 20090-6456

TO: Thomas M. Walsh
Assistant General Counsel
Marketing Division, OGC

THROUGH: Richard M. McKee
Acting Director
Dairy Division

FROM: Eugene E. Krueger, Head
Promotion and Research Staff B
Dairy Division

SUBJECT: Contract between the National Dairy Promotion and Research Board (NDB) and the United Dairy Industry Association (UDIA) to Create the Joint Venture Dairy Management, Inc.

ISSUE:

The attached contract between NDB and UDIA is to create a joint venture called Dairy Management, Inc., (DMI). DMI would provide staffing support to both NDB and UDIA.

BACKGROUND:

A lack of generic promotion coordination between the national and State and regional programs has been a regular dairy producer complaint since the beginning of the Dairy Promotion Program. The DMI joint venture (approved by NDB at its March 1994 meeting) is another in a long series of steps taken by NDB to increase this coordination.

DMI will not be a merger of NDB and UDIA. It will be a merger of their separate staffs into a single staff that serves

both organizations. The Dairy Promotion and Research Order (7 CFR 1150) in section 140(c) states that the National Dairy Board has the duty "to appoint or employ such persons as it may deem necessary." It is the duty of NDB and not the Department to establish NDB's staffing needs and organizational structure.

RECOMMENDATION:

Concurrence: /s/ Thomas M. Walsh
Date: 6/7/94

Attachment

[LOGO] The Agricultural Marketing Service
is an agency of the
United States Department of Agriculture

APPENDIX L

CALIFORNIA MILK PROCESSOR BOARD
Jeff Manning
Executive Director

September 11, 1998

David Jamison
USDA
14th & Independence SW
Washington DC 20250

Deaf David:

This follows up our very productive conversation and formally requests that the USDA reconsider its judgement on the, "Paws" GOT MILK? Commercial. As the Licensor of the GOT MILK? tradernark, this request is being made on behalf of Dairy Management Inc. (DMI) and their state and regional units (S&Rs).

Backgroound

• The California Milk Processor Board (CMPB) began running GOT MILK? advertising in late 1993. In the Fall of 1995 DMI made the decision to license the, trademark and campaign for use nationally and by its S&Rs. This has proven to an exceptional arrangement for all parties. As a result of this licensing agreement, plus the integration of the DMI and MilkPEP marketing programs, MilkPEP also began licensing the trademark in July of 1998.

• In May and June, 1998 the CMPB developed three new Commercials for use in. California ("Halt of Mirrors," "Paws" and "Animal Crackers"). These were presented to DMI and its member managers in script form and produced in July and August. ("Animal Crackers" is still in production.)

"Hall of Mirrors" and "Paws" went on air in California in September and they immediately became available to DMI and its S&Rs.

• In late August, 1998, DMI received your letter (Exhibit 1) stating that "Paws" was not appropriate for use in light of Departmental regulations and guidelines. Specifically, the Department judged that it: 1) ". . . made use of unfair or deceptive acts or practice with the respect to the quality, value or use of any competing product," (non-dairy creamer) and 2) ". . . is potentially disparaging to another agricultural commodity because non-dairy creamers routinely contain ingredients from soybeans."

• Given the importance of this commercial to DMI and its S&Rs, we decided to pursue the matter. As we discussed, the dairy industry has the right to appeal the decision and the Department is open to this appeal.

Proposal

This proposes that the Department reconsider its decision regarding "Paws" and, based on the evidence and arguments presented below, allow the .dairy industry to use this commercial in its struggle against competitive beverages.

Rationale

• This commercial does not "make use of unfair or deceptive acts or practices" nor does it devalue or disparage non-dairy creamers. Consumers understand that the GOT MILK? campaign is a spoof. They also understand that non-dairy creamer is not intended to be used for cats. We are no more serious about the use of non-dairy creamer for cats than we were about a history buff losing $10,000 because he had a mouth full of peanut butter, or a father attempting to take milk from his baby's bottle for his cereal. Further, no claims or direct comparisons were made in the "Paws" spot.

At no time in the research did consumers raise the issue of the quality or value of non-dairy creamer for its intended purpose. In fact, they hardly mentioned non-dairy creamer at all. Rather, they were squarely focused on the plight of the milk-deprived grandmother (which is why "Paws" is so valuable to the milk industry).

• "Paws" is not disparaging to another agricultural commodity, Non-dairy creamer is probably as far from an agricultural product as one could get. It's highly processed and contains a long list of artificial ingredients. I am convinced that if asked, consumers would not have any idea what crop (if any) was used in the manufacture of non-dairy creamer.

Additionally we do not .mention or portray any agricultural food product. The packaging in the commercial is totally generic and void of any brand or ingredient mentions: The issue of ingredients was never raised by consumers in the research.

• The commercial certainly does not disparage soybeans. The commercial does not reference soybeans visually or in copy. The word "soybean" never surfaced in consumer research.

And finally, John Becherer, CEO of the United Soybean Board, has viewed "Paws" and does not have any concerns regarding its use by the dairy industry. His letter confirming this is attached as Exhibit II.

• There is no evidence that "Paws" is not appropriate for use. Had we either used soy milk or shown people rejecting nondairy creamer for their coffee, we would concur with the Department's interpretation. However, as it stands, we believe that "Paws" is consistent, with the entire GOT MILK? campaign and appropriate for use within the regulations and guidelines.

• "Paws" is crucial to the dairy industry. It has a value of nearly $500,000. It is, based on research and judgement, one of our most powerful commercials against adults. It has already been presented dairy groups from around the country and they are extremely exited about using it, It is one of only three new spots available for use in 1998 and early 1999. And it comes at a time when the dairy industry needs every marketing "bullet" it can get.

• We need never be in this position again. We will make a commitment to submit, through DMI, storyboards of all future commercials available for licensing. In this manner, the industry will receive your input before production dollars are invested and while adjustments can still be made.

• Allowing the industry to use "Paws" does not involve any risk on the Department's part. We believe that we have provided enough new evidence and thinking to justify its use; Therefore, should the Department ever receive a question or complaint, you will have very strong grounds for your position and the full support of both milk producers and processors.

• "Paws" is not negative or malevolent. The humor is consistent with all of the GOT MILK? commercials, dating back to our first spots in 1993. America loves GOT MILK? because funny, outrageous things happen to GOT MILK? characters. And consumers loved "Paws." They smirked, they giggled and they laughed out loud when shown the spot. There was not the slightest evidence that they felt it conveyed a negative or harmful message. It simply reminded them of how important it is to have plenty of milk in the refrigerator.

David, I apologize for the length of this note. However, as you can tell, the industry feels very strongly that this commercial deserves to run, We therefore ask that the Department 1) reconsider "Paws" in light of this evidence and 2) support milk producers and processors by allowing its use. We also

want to restate our commitment to submit new GOT MILK? spots through DMI before production begins.

Please let Linda Racicot (DMI) and I know if it would be valuable for us to present our case in person. We would welcome the opportunity if it would increase the chance to use "Paws" by even t h e smallest margin.

Lastly, it has been a pleasure speaking with you and I hope we get to work more closely in the future.

Sincerely,

/s/ [Illegible]

cc: Tom Gallagher, Lionda Racicot, Chick Powell

APPENDIX M

DMI DAIRY MANAGEMENT INC.™

AMERICAN DAIRY ASSOCIATION
NATIONAL DAIRY COUNCIL
U.S. DAIRY EXPORT COUNCIL

September 14, 1998

David R. Jamison, Chief
U.S. Department of Agriculture
Dairy Division, Promotion and Research Branch
Room 2734-S, Stop 0233
1400 Independence Ave., S.W.
Washington, DC 20250-0233

Dear David:

We have received your letter concerning the "got milk" television advertisement entitled "Paws". We would ask that USDA rereview the advertisement on the following grounds:

The intention of the "got milk" commercials is to present a humorous depiction of running out of milk. In this version, the non-dairy creamer was meant to pose a humorous situation where the woman ran out of milk and tried to substitute another product.

The use of non-dairy creamer was in a non-conventional manner. Non-dairy creamer is not intended to be substituted for milk as a beverage. Had non-dairy creamer been compared to milk usage as an additive in coffee, we would agree that would be disparaging

While it is true that non-dairy creamers are composed of soybean-derived ingredients, there is not a direct mention of that commodity product. Unless the consumer is familiar with the composition of non-dairy creamers, we would not estimate that they would make the connection.

As a result of the review, we understand that Jeff Manning, Executive Director of the CMPB, is willing to make changes in his approach to developing creative for television advertisements. This would include the use of storyboards, which would be reviewed by you and your team prior to production of commercials. We find this an acceptable practice, which could help us to avoid such issues in the future We would hope that you would find this an acceptable change in the procedure.

Please keep me informed of any decisions made by USDA with regard to these commercials.

Sincerely,

/s/ Linda D. Racicot, Ph.D.
LINDA D. RACICOT, PH.D.
Group Executive
Domestic Marketing Operations

APPENDIX N

Mr. Charles Powell
Vice President Milk Marketing
Dairy Management Inc.
10255 West Higgins Road, Suite 900
Rosemont, Illinois 60018-5616

Dear Chuck:

Thank you for providing us with the proposed "got milk?" television advertisements entitled "Paws" and "Hall of Mirrors" that were developed by Goodby, Silverstein & Partners. It is our understanding that the ads have not been aired yet by Dairy Management Inc. (DMI). We have carefully reviewed the ads. Based upon our review, the "Paws" ad is not appropriate for use in light of Departmental regulations and guidelines. The use of any assessment funds from either the National Dairy Promotion Program or the National Fluid Milk Processor Promotion Program is prohibited concerning this ad.

As you are aware, the Dairy Promotion and Research Order states that no plan or project authorized under the Section shall make use of unfair or deceptive acts or practices with respect to the quality, value or use of any competing product (Section 1150.161(c)). The use of the non-dairy creamer in the "Paws" ad does not conform with this provision. The ad portrays the creamer as an inferior product when substituted for milk. In addition, the ad is potentially disparaging to another agricultural commodity because nondairy creamers routinely contain ingredients derived from soybeans. The ad is also inappropriate for the same reasons under the Guidelines for the Agricultural Marketing Service's Oversight of Commodity Research and Promotion Programs which applies to all generic commodity research and promotion programs.

We appreciate your efforts to keep us informed of the new advertising materials being considered by DMI.

If you have any questions on this subject, please call give me a call at (202) 720-6909.

Sincerely,

/s/ David R Jamison
David R Jamison
Chief, Promotion and Research Branch
Dairy Programs

cc: Thomas Gallagher, Chief Executive Officer, DMI
Linda Racicot Ph.D., Group Executive, Domestic Marketing Operations, DMI
Jeff Manning, Executive Director, California Fluid Milk Processor Board

APPENDIX O

[LOGO]
UNITED SOYBEAN BOARD
Making Your Checkoff Pay Off.

September 11, 1998

Mr. Jeff Manning
California Milk Processors Board
1801A Fourth Street
Berkley, CA 94708

Dear Jeff:

I appreciated the opportunity to discuss the "Milk Paws" commercial with you. Subsequently, I received a copy of the commercial in the mail and have reviewed it. I did not find it in any way disparaging to soybeans or the soybean industry.

I appreciate you bringing this to my attention and for my consideration.

Sincerely,

/s/ John Becherer
John Becherer
Chief Executive Officer

APPENDIX P

[LOGO]

United States Department of Agriculture
Rural Business-Cooperative Service
RBS Research Report 173

Marketing Operations of Dairy Cooperatives

Abstract The Nation's 226 dairy cooperatives marketed 127.4 billion pounds of milk, or 83 percent of all milk sold to plants and dealers, in 1997. These cooperatives were owned by 87,938 member-producers. Sixty-three cooperatives operated 203 dairy processing and manufacturing plants, 25 with milk-receiving stations only and 138 with no milk-handling facilities. Cooperatives sold 14 percent of the Nation's packaged fluid products, 6 percent of the ice cream, 61 percent of the butter, 76 percent of the dry milk products, 40 percent of the natural cheese, 48 percent of the dry whey products, and 10 percent of the cottage cheese.

Key words: Cooperatives, dairy products, marketing, milk, structure.

Marketing Operations of Dairy Cooperatives

K. Charles Ling
Rural Business-Cooperative Service

RBS Research Report 173

June 1999

Preface: Information for this report came primarily from a survey of all U.S. dairy cooperatives. In some cases, data were estimated for nonrespondents based on their financial statements or other sources.

Data covers cooperatives' fiscal year ending in calendar 1997. These fiscal years vary within the calendar year, so their data reflect some differences in time periods. This report updates ACS Research Report 133 based on cooperative operations for the fiscal year ending in calendar 1992.

Because of the rapid cooperative structural changes in recent years, some of the larger cooperatives have significant operations in regions other than where cooperatives are headquartered. Regional marketing data on cooperative operations based on where cooperatives are headquartered are no longer meaningful and are discontinued in this report.

The author acknowledges assistance from some State agencies for this study, plus USDA's National Agricultural Statistics Service and particularly Federal milk market administrators for supplying data as authorized by some cooperatives.